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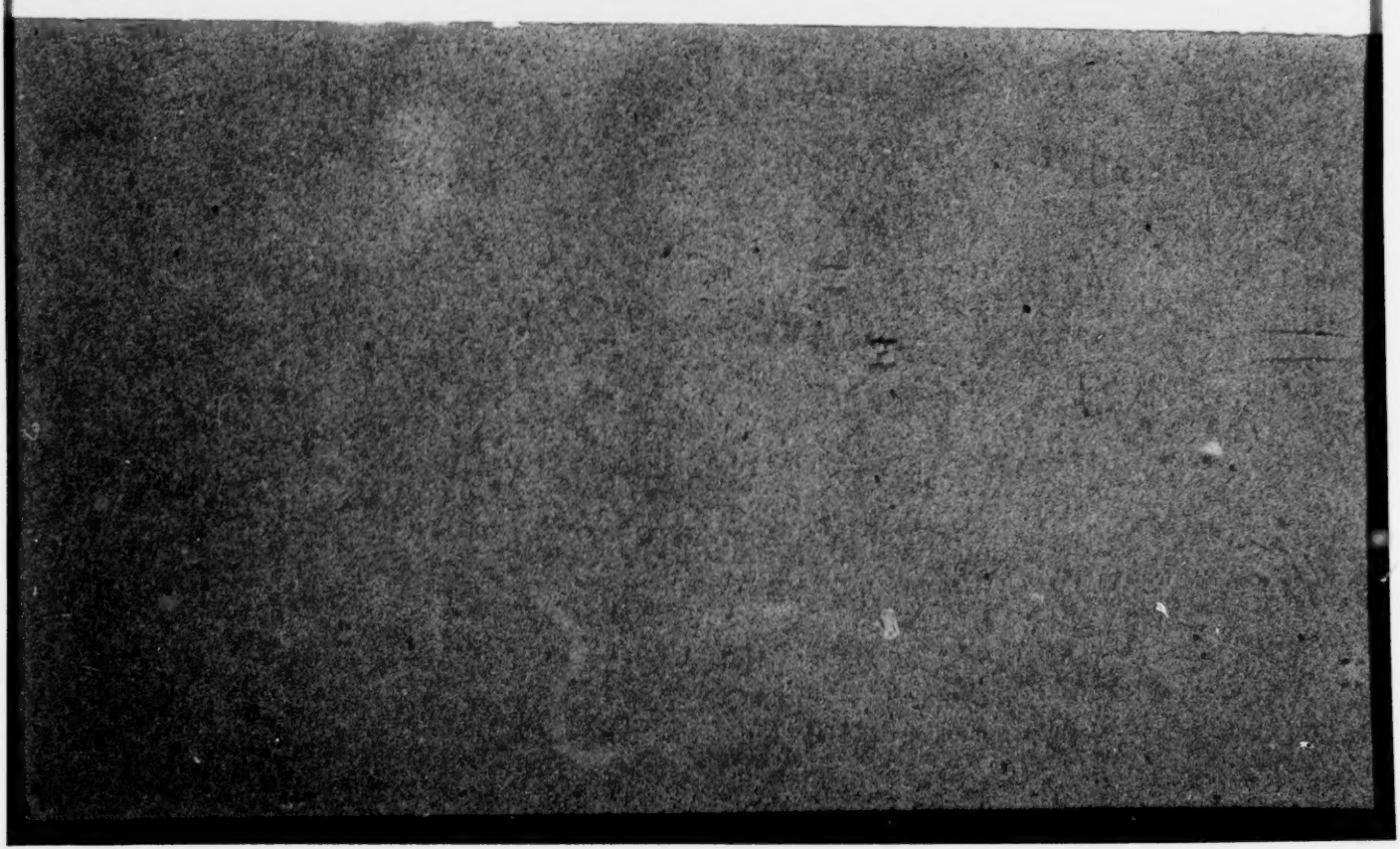

(18,590.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 76.

THE CLIPPER MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE ELI MINING AND LAND COMPANY, A. D. SEARL, F. C. SCHROEDER, A. F. BRITTON, AND H. J. GRAY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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1 In the Supreme Court of the State of Colorado.

THE CLIPPER MINING COMPANY, Plaintiff in Error,
vs.
THE ELI MINING & LAND COMPANY, A. D. SEARL, F. C. Schroeder, *et al.*, Defendants in Error. } No. 4115.

To the Honorable John Campbell, chief justice of the supreme court of the State of Colorado:—

Now comes the plaintiff in error above named, The Clipper Mining Company, and respectfully represents and shows that in the record and proceedings, and also in the rendition of judgment by this court in the suit of The Clipper Mining Company defendant in the district court and plaintiff in error in this court *vs.* The Eli Mining & Land Company, F. C. Schroeder, A. D. Searl and others, plaintiffs in the court below and defendants in error in this court, the same being case No. 4115 on the dockets of this court the same being the highest court of law and equity in the State of Colorado in which a decision could be had in said suit, and in which a final judgment was rendered upon the merits in said cause by affirming the judgment of the district court of Lake county, which said judgment was in favor of the plaintiff and against the defendants, and settled all matters in controversy between said parties in said cause, manifest error was committed to the detriment and wrong of the said plaintiff in error in that the said The Clipper Mining Company, the plaintiff in error in said cause claimed
2 the title, right and privilege under the Constitution and laws of the United States of America to the ownership of four certain lode mining claims known respectively as the Clipper, Castle, Congress and Capitol Lode mining claims located in the California mining district, county of Lake and State of Colorado, the title to which was claimed by said Clipper Mining Company under the laws of the United States of America and the decision of the said district court of Lake county and affirmed by the supreme court of the State of Colorado was against said title; and in the trial of said cause the district court of Lake county in passing upon said title claimed under the laws of the United States, committed a grievous error to the detriment and damage of your petitioner, the said The Clipper Mining Company, in that the said court held that the action of the Commissioner of the General Land Office and the Secretary of the Interior of the United States in determining that the title set up in opposition to that of your said petitioner was null and void and was not binding upon said court; the said court erred in refusing to admit in evidence, the proceedings of the said Secretary of the Interior and the Commissioner of the General Land Office, setting aside the title claimed in opposition to that of your petitioner, and your petitioner further avers that in the record the said district court of Lake county and the supreme court of Colo-

rado erred in holding that your petitioner had not the right under the laws of the United States to enter upon a possessory placer claim and discover and locate lodes prior to the time that said placer claim had applied for patent, and your petitioner further avers that in such record and the opinion of this court, error was committed to the detriment and injury of your petitioner in holding that the owner of a placer claim who had applied to the Government of the United States for a patent upon same, which said application had been rejected for the reason that the ground embraced therein was not territory subject to location as a placer and still had remaining possessory rights which he was entitled to assert against third persons locating said ground as lode claims and said court erred in rendering judgment against your petitioner and in favor of the plaintiffs in said suit, and in divers other manners and particulars involving questions arising under the constitution and laws of the United States as will more particularly appear from the record in said cause and the assignments of error made therein.

Wherefore your petitioner prays for the allowance of a writ of error and such other process as may cause said record to be removed to the Supreme Court of the United States and these errors to be corrected by that tribunal.

(Signed) THOMAS, BRYANT & LEE,
Attorneys for Plaintiff in Error.

Upon the foregoing petition, a writ of error to the Supreme Court of the United States is ordered this 26th day of March, A. D. 1902.

(Signed) JOHN CAMPBELL,
Chief Justice of the Supreme Court of Colorado.

In the Supreme Court of the State of Colorado.

THE CLIPPER MINING CO., Plaintiff in Error,
v.
THE ELI MINING & LAND CO., A. D. SEARL, F. C. Schroeder, *et al.*, Defendants in Error.

4115. Order for Writ of Error.

To Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, Greeting:

In the above entitled cause, judgment was rendered against the above named petitioner, The Clipper Mining Co. on the 3rd day of March, A. D. 1902 and in the hearing and determination of said cause, there were involved several Federal questions, and certain rights under the Constitution and statutes of the United States; and the said The Clipper Mining Co. petitioner, by its attorneys, Thomas, Bryant & Lee, has filed its petition, praying the allowance of a writ of error, removing this cause to the Supreme Court of the U. S. for further proceedings, and having duly considered said petition, it is considered that a writ of error should be allowed.

You are therefore commanded to prepare and forward a writ of

error wherein the said The Clipper Mining Co. is pl't'ff in error and the said The Eli Mining & Land Co. A. D. Searl, and F. C. Schroeder *et al.*, are d'f'ts in error, and forward the same to me with all due haste.

Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, on this 29th day of April A. D. 1902 and of the Independence of the United States the one hundred and twenty-sixth at Denver, in the State of Colorado.

JOHN CAMPBELL,
Chief Justice of the Supreme Court
of the State of Colorado.

5 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the chief justice and the honorable judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Colorado, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Clipper Mining Company, plaintiff in error, and The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, *et al.* defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said The Clipper Mining Company, as by its complaint appears, we being
6 willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty (30) days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of

right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 29th day of April, in the year of our Lord one thousand nine hundred and two.

Seal U. S. Circuit Court, District of Colorado.

ROBERT BAILEY,
Clerk of the Circuit Court of the United States for the District of Colorado,
By CHARLES W. BISHOP,
Deputy Clerk.

Allowed by—
JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

7 *Return on Writ of Error.*

UNITED STATES OF AMERICA, }
District of Colorado, State of Colorado. }

In obedience to the command of the above and foregoing writ, I herewith transmit to the honorable the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the above entitled cause, together with all things concerning the same.

Witness my hand and the seal of the supreme court of the State of Colorado, at Denver, in said State, this 26th day of March, A. D. 1902.

Seal Supreme Court, State of Colorado.

HORACE G. CLARK,
Clerk Supreme Court of the State of Colorado,
By —— ——, *Deputy Clerk.*

8 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, District of Columbia, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein The Clipper Mining Company is plaintiff in error, and The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, *et al.*, are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Campbell, chief justice of the supreme court of the State of Colorado, this 29th day of April, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States, the one hundred and twenty-sixth year, at Denver, in the State of Colorado.

JOHN CAMPBELL,
Chief Justice of the Supreme Court of the State of Colorado.

A copy of the foregoing citation was delivered to me on the 7 day of May A. D. 1902, and I hereby accept service thereof on behalf of the said defendants in error, The Eli Mining Company, A. D. Searl, F. C. Schroeder, *et al.*

CHARLES CAVENDER,
JOHN A. EWING,
Attorneys for Defendants in Error,
The Eli Mining Company and A. D. Searl.

9 UNITED STATES OF AMERICA, } ss:
State of Colorado, }

Know all men by these presents, that we, The Clipper Mining Company as principal, and Frank Cox and H. C. Rowley, as sureties, are held and firmly bound unto The Eli Mining & Land Company, F. C. Schroeder, A. D. Searl and the defendants in error in the case of The Clipper Mining Company, plaintiff in error, *vs.* The Eli Mining & Land Company *et al.*, defendants in error, No. 4115, in the supreme court of the State of Colorado, in the full and just sum of $500 to be paid to the said, The Eli Mining and Land Company and others, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 26th day of March in the year of our Lord, one thousand, nine hundred and two.

Whereas lately at the January term, A. D. 1902, in the supreme court of the State of Colorado in a case pending in said court between the said The Clipper Mining Company as plaintiff in error and The Eli Mining & Land Company, *et al.*, as defendants in error, the same being case No. 4115 on the docket of said court, judgment was rendered against the said The Clipper Mining Compaay for possession of certain real properties and costs and the judgment of the district court of Lake county in said cause was affirmed and the said The Clipper Mining Company have obtained a writ of error to reverse the said judgment of the supreme court of Colorado, and the citation has been issued directed to said, The Eli Mining and Land Company and others, citing and admonishing them to be and
10 appear at the regular term of the Supreme Court of the United States to be held at Washington, D. C. at the October term, A. D. 1902, now the condition of the above obligation is such that if the said The Clipper Mining Company shall, pursuant to said writ of error, pay and answer for all damages or costs if they fail

to make good their plea, then the above obligation to be void, else to remain on full force and virtue.

THE CLIPPER MINING COMPANY,
(Signed) By THOMAS, BRYANT & LEE, *Attorneys.*
(Signed) FRANK COX.
(Signed) H. C. ROWLEY.

Approved March 26, 1902.
(Signed) JOHN CAMPBELL,
Chief Justice of the Supreme Court of Colorado.

STATE OF COLORADO, }
County of Arapahoe, } ss:

—— —— and —— —— sureties on the within bond being each first duly sworn deposes and says: that he is worth in property the amount of said bond, over and above all his just debts and liabilities in property subject to levy and sale upon execution.

—— ——.
—— ——.

Subscribed and sworn to before me this — day of March, A. D. 1902.

—— ——.

11 In the Supreme Court of the United States.

THE CLIPPER MINING COMPANY, Plaintiff in Error,
vs.
THE ELI MINING & LAND COMPANY, A. D. SEARL, F. C. SCHROEDER, *et al.*, Defendants in Error.

Error to the supreme court of the State of Colorado.

Comes now the plaintiff in error in the above entitled cause, and avers that in the record and proceedings in said cause, the supreme court of the State of Colorado erred to the grievous injury of the plaintiff in error herein, in the following particulars, to-wit:

1. The court below erred in sustaining the action of the district court of Lake county in overruling the demurrer of defendants to the complaint of the plaintiffs.

2. The said supreme court erred in sustaining the action of the district court of Lake county in refusing to grant the motion of the defendant for judgment on the pleadings for the reasons set forth in the written motion of said defendants, and for the reasons appearing upon the face of the pleadings and record in said cause, which clearly entitled the defendant to judgment thereon.

3. The supreme court of Colorado erred in sustaining the action of the district court of Lake county in overruling the objec-
12 tion of the defendant to the introduction in evidence by the plaintiff of testimony concerning the location of the Searl

placer location, for the reason that under the issues in said cause as made up, the title claimed by the plaintiff had been declared void by the land office of the United States, and the court erred in admitting any evidence or testimony concerning said title contained in the bill of exceptions filed in said cause.

4. The supreme court of Colorado erred in sustaining the action of the district court of Lake county in admitting in evidence over the objection of the defendant, the opinion of the Secretary of the Interior of May 13th, 1896 as reported in the 22nd Land Decisions, page 527, for the reason that the said opinion was immaterial, incompetent and irrelevant under the issues.

5. The supreme court of the State of Colorado erred in sustaining the action of the district court of Lake county in finding upon the evidence that the Searl placer was duly located as required by law in 1877 and that the annual labor had been performed as required by law from — time to the time of trial as set forth in the findings of the court upon the testimony.

6. The supreme court of Colorado erred in finding as a matter of law that the defendant in said cause in the trial court, The Clipper Mining Company, had no right to enter within the limits of the Searl placer location and locate the lode mining claims mentioned herein.

7. The supreme court of Colorado erred in sustaining the trial court in finding as a matter of law that the discoverer of a lode mining claim had no right to enter within the limits of a prior located placer claim and before the said placer claimant had applied for patent to make a discovery and location of a lode mining claim.

13 8. The supreme court of Colorado erred in sustaining the ruling of the trial court in holding that the decision of the Land Department of the Government of the United States holding certain lands not to be subject to location and patent as a placer mining claim were not conclusive upon the courts and binding upon the courts and all other persons who should attempt to locate said land as a placer mining claim.

9. The supreme court of Colorado erred in affirming the judgment of the district court of Lake county.

10. The supreme court of Colorado erred in its main opinion in holding that the decisions of the Land Department of the United States made in rejecting the application of a claimant to the public lands for patent is not as conclusive and binding as the decision of the same department in accepting an application for patent and issuing a patent thereon.

11. The supreme court of Colorado erred in holding that the decisions of the Land Department in controversies concerning the public lands properly brought before that department are not *res judicata* upon the courts where the same matters are afterwards attempted to be reviewed by the courts.

12. The supreme court of Colorado erred in its opinion in holding that the owner of a valid placer claim is entitled to such exclu-

sive possession thereof that before such owner applies for patent, third parties are not entitled to enter within said placer claim and discover and locate lodes which are shown to have an actual existence within said placer.

13. The supreme court of Colorado erred in its opinion upon a petition for rehearing, in holding that an application for a
14 patent upon a placer claim which is rejected by the Land Department of the United States fixed the time at which the question of when a known lode exists within a placer is to be determined.

14. The supreme court of Colorado erred in its ruling upon the petition for rehearing in rejecting the application of the plaintiff in error to file a supplemental record.

And in divers other particulars the said the supreme court of the State of Colorado erred to the injury of this plaintiff in error.

Wherefore the plaintiff in error prays that the judgment of the supreme court of the State of Colorado may be reversed and set aside and for naught held.

(Signed) THOMAS, BRYANT & LEE,
Attorneys for Plaintiff in Error.

Endorsed: No. 4115. In the supreme court of Colorado. The Clipper Mining Company, plaintiff in error, *versus* The Eli Mining & Land Company *et al.*, defendants in error. Petition for writ of error, bond, and assignment of errors to Supreme Court of the United States. Filed in supreme court, Mar. 26, 1902. Horace G. Clark, clerk. Thomas, Bryant & Lee, attorneys for plaintiff in error. 621–627 Ernest and Cranmer bldg., Denver, Colo.

15 In the Supreme Court of the State of Colorado.

THE CLIPPER MINING COMPANY Plaintiff in Error,
vs.
THE ELI MINING AND LAND COMPANY ET AL., Defendants in Error. } No. 4115.

Comes now the plaintiff in error by Thomas, Bryant & Lee its attorneys, and alleges that in the record and proceedings in said cause in the court below manifest error was committed by said court, to the injury and prejudice of said plaintiff in error in the following particulars, to-wit:

1. The court below erred in overruling the demurrer of the defendants to the complaint of the plaintiff.

2. The court below erred in refusing to grant the motion of the defendant for judgment on the pleadings, for the reasons set forth in the written motion of the said defendants, and for the reasons appearing upon the face of the pleadings in said cause which entitle the defendants to judgment thereon.

3. The court below erred in overruling the objection of the defendants to the introduction in evidence by the plaintiff of testimony

concerning the location of the Searl placer or the character of the ground covered thereby, or any testimony concerning the title claimed by the plaintiffs under the said Searl placer location, for the reason that under the issues in this cause, as made up, the
16 title claimed by the plaintiff had been declared void by the land office of the United States, and in admitting any evidence or testimony tending to prove these matters, as more fully set forth by the bill of exceptions filed in said cause.

4. The court below erred in admitting in evidence over the objection of the defendant the opinion of the Secretary of the Interior of May 13, 1896, as reported in the 22 Land Decisions, page 527, for the reason that said opinion was immaterial, incompetent and irrelevant under the issues, and was not offered in evidence at the proper time by the said plaintiffs.

5. The court below erred in finding from the evidence that the Searl placer was duly located, as required by law, in 1877, and that the annual labor had been performed, as required by law, from that time to the time of trial, as set forth in the findings of the court upon the testimony, at the close of the testimony.

6. The court below erred in finding as a matter of law that the said defendant, The Clipper Mining Company, had no right to enter within the limits of the Searl placer and locate the lode mining claims mentioned herein.

7. The court below erred in finding as a matter of law that the discoverer of a lode mining claim had no right to enter within the limits of a prior located placer claim and before the said placer claimant had applied for a patent, and make a discovery and location of said lode mining claim.

8. The court below erred in holding that the decisions of the Land Department of the Government of the United States holding certain land to be not subject to location and patent as a placer
17 mining claim, were not conclusive upon the courts and binding upon the courts and all other persons who should attempt to locate said land as a placer mining claim.

9. The court below erred in entering judgment in said cause in favor of the plaintiff and against the defendant.

10. The court below erred in refusing to enter judgment in said cause in favor of the defendant and against the plaintiff upon the ground in controversy.

And in divers other particulars the court below erred, to the prejudice of the defendant in said cause.

THOMAS, BRYANT & LEE,
Attorneys for Plaintiff in Error.

Endorsed: No. 4115—In the supreme court of Colorado—The Clipper Mining Company plaintiff in error *versus* The Eli Mining & Land Company *et al.*, defendants in error—Assignment of errors—Filed Sept. 19, 1899—Horace G. Clark clerk

18 UNITED STATES OF AMERICA:

Be it remembered, that at the December term, A. D. 1895, of the district court of the fifth judicial district of the State of Colorado, held within and for the county of Lake, commencing on Monday, the second day of December, A. D. 1895, begun and held in the city of Leadville, county of Lake and State of Colorado, at the court house therein,

Present: Hon. F. W. Owers, judge of said court; L. R. Thomas, Esq., district attorney; —— ——, bailiff of said court; Gavin Leslie, Esq., sheriff of Lake county; John H. Dunn, Esq., clerk of said court.

The following, among other proceedings, were had, to-wit:

19 Be it remembered, that heretofore, and on, to-wit, the 15th day of January, A. D. 1896, it being one of the regular juridical days of the December term 1895, of the district court of the fifth judicial district, sitting within and for the county of Lake, State of Colorado, the following proceedings, *inter alia*, were had and entered of record in said court, before the Hon. M. S. Bailey, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND CO. ET AL.
vs.
THE CLIPPER MINING COMPANY. } 4580.

At this day come the parties hereto by their attorneys respectively. And thereupon this cause coming on to be heard upon the demurrer of defendant to the complaint herein and by consent of the parties hereto being submitted to the court without argument, and the court being now well advised in the premises doth overrule said demurrer.

And thereupon it is ordered by the court that the defendant herein have time and twenty days in which to file its answer and the plaintiffs have time and ten days after the filing of the answer herein in which to plead.

M. S. BAILEY, *Judge.*

20 TUESDAY, *October 26th, A. D.* 1897.

In Chambers.

STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING & LAND COMPANY ET AL., Plaintiffs,
against
THE CLIPPER MINING COMPANY, Defendant.

The demurrer of the plaintiffs to the second, third, fourth, fifth and sixth defenses contained in the answer of defendant to the com-

plaint of plaintiffs herein coming on this day to be heard before the undersigned judge of the district court of the eleventh judicial district of the State of Colorado, agreeable to stipulation entered into between the record attorneys of the respective parties hereto, plaintiff appearing by John A. Ewing, Esq., by written brief and the defendant by Messrs. Thomas, Bryant & Lee its attorneys also by written brief, and the said judge of said court being now well and fully advised in the premises doth overrule said demurrer to each of said defenses.

To which ruling of said judge plaintiffs by their attorney duly object and except. Time and until ten days after notice of this order given to plaintiffs' said attorney is given to plaintiffs in which to elect to stand by their said demurrer or to reply to said second, third, fourth, fifth and sixth defenses set up in defendant's
21 said answer, as they may be advised.

Dated October 26, 1897.

(Signed) M. S. BAILEY, *Judge.*

And afterwards, and on, to-wit, the 22d day of November, A. D. 1897, it being one of the regular juridical days of the August term, 1897, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, before Hon. F. W. Owers.

THE ELI MINING & LAND COMPANY ET AL.
vs.
THE CLIPPER MINING COMPANY. } 4580.

At this day on motion of defendant, it is ordered by the court that another judge other than the Hon. Frank W. Owers, be called in to try the issues in this cause.

And afterwards, and on, to-wit, the 31st day of January, A. D. 1898, it being one of the regular juridical days of the December term, 1897, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND COMPANY ET AL.
vs.
THE CLIPPER MINING COMPANY. } 4580.

At this day come the plaintiffs herein by J. A. Ewing, Esq., and Charles Cavender, Esq., their attorneys, and the said defendant appears by Harry Lee, Esq., of counsel for said defendant.
22 And thereupon on consent of the said parties, it is ordered by the court that the hearing of the motion of defendant for judgment on the pleadings herein be and the same is hereby set down for 2 o'clock p. m.

At the aforesaid mentioned hour come the respective parties

hereto by their attorneys respectively. And thereupon this cause comes on to be heard upon the motion of defendant herein for judgment on the pleadings, is argued by counsel, and the court being not now sufficiently advised in the premises, doth take the same under further consideration until February 1st, 1898.

And afterwards, and on, to-wit, the 1st day of February, A. D. 1898, it being one of the regular juridical days of the December term 1897, of said court, the following proceedings, *inter alia*, were had and entered of record in said court before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND COMPANY ET AL.
vs.
THE CLIPPER MINING COMPANY.

The motion for judgment on the pleadings in this case having been argued by counsel and taken under advisement,

Now at this day the court being sufficiently advised in the premises; finds that an issue has been joined in this cause which requires a trial to determine; the court further finds that the matters insisted upon by defendants to sustain said motion concern rulings and actions of the Land Department of the United States Government, which are reserved for further consideration upon the trial of this cause:

23 It is therefore ordered that the motion be overruled: to which order the defendant excepted.

And thereupon on application of the defendants to have this cause set down for trial it appearing by affidavits that plaintiffs are unable at this time to have the case set down for trial.

It is in open court agreed and stipulated by counsel that this cause may be set down for trial on the 25th day of April A. D. 1898 and that the Honorable Frank W. Owers, judge of the fifth judicial district be requested to call some other district judge of the State of Colorado to preside at said trial.

And afterwards, and on, to-wit, the 25th day of April, A. D. 1898, it being one of the regular juridical days of the March term, 1898, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND CO. ET AL.
vs.
THE CLIPPER MINING COMPANY. } 4580.

At this day come the plaintiffs herein by John A. Ewing, Esq., Charles Cavender, Esq., and W. W. Davis, Esq., their attorneys, and the said defendant by Thomas, Bryant & Lee its attorneys. And

thereupon this cause comes on to be tried before the court, without a jury, a jury herein being expressly waived by both parties hereto. Thereupon comes on for hearing the evidence herein, and the same not being concluded at the hour of adjournment, the further hearing of said cause is continued until to-morrow morning.

24 And afterwards, and on, to-wit, the 26th day of April, A. D. 1898, it being one of the regular juridical days of the March term, 1898, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. F. W. Owers, judge.

THE ELI MINING & LAND CO. ET AL.
vs.
THE CLIPPER MINING COMPANY. } 4580.

At this day come again the said parties by their attorneys respectively. And thereupon the trial of the issues herein joined is resumed. Thereupon after the plaintiffs had rested their case defendants move to dismiss this suit as in case of nonsuit, which motion is argued by counsel, and the court being now well advised in the premises, doth deny said motion.

And the evidence of this case not being concluded at the hour of adjournment, the further hearing of same is hereby continued until to-morrow morning at 10 o'clock a. m.

And afterwards, and on, to-wit, the 27th day of April, A. D. 1898, it being one of the regular juridical days of the March term 1898, of said court, the following proceedings were had and entered of record in said court, before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. Frank W. Owers, judge.

25 THE ELI MINING & LAND CO. ET AL.
vs.
THE CLIPPER MINING COMPANY. } 4580.

At this day come again the said parties by their attorneys respectively. And thereupon the further hearing of the issues herein joined comes on to be heard. And the evidence not being concluded at the hour of adjournment,

It is ordered by the court that the further hearing of this cause be and the same hereby is continued until April 28th, A. D. 1898.

And afterwards, and on, to-wit, the 28th day of April, A. D. 1898, it being one of the regular juridical days of the March term, 1898, of said court, the following proceedings, *inter alia*, were had and entered of record before the Hon. Thomas A. Rucker, district judge, presiding at request of Hon. Frank W. Owers, judge.

THE ELI MINING & LAND CO. ET AL.
vs.
THE CLIPPER MINING COMPANY. } 4580.

At this day come again the said parties by their attorneys respectively. Thereupon the trial of the issues herein joined is resumed.

And the court having heard the evidence, and the arguments of counsel, and not being sufficiently advised in the premises, doth take the same under advisement.

And it is further ordered by the court that when the decision in this cause is rendered, it shall be rendered as of this day.

26 Thereupon it is ordered by the court that plaintiffs have time and one week in which to present their brief herein, and defendant one week thereafter in which to answer, and plaintiffs one week thereafter in which to reply.

SATURDAY, *May 28th, A. D.* 1898.

The following proceedings, *inter alia*, were had before the Hon. Thomas A. Rucker, sitting in chambers, upon the request of Hon. Frank W. Owers, judge of the fifth judicial district.

THE ELI MINING & LAND CO. ET AL.
vs.
THE CLIPPER MINING COMPANY. } 4580.

At this day come the parties hereto and ask and have leave to withdraw their respective exhibits filed herein for the period of thirty days upon receipting to clerk therefor.

THOMAS A. RUCKER,
Judge, Acting for and in the Absence of
Hon. Frank W. Owers, District Judge.

WEDNESDAY, *June 8th, A. D.* 1898.

The following proceedings, being the decision was filed on the above mentioned date, but it is to be entered of record as of the 28th day of April, A. D. 1898.

27 THE ELI MINING & LAND COMPANY, a Corporation, etc.; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, a Corporation, etc., Defendant. } No. 4580.

This cause coming on to be heard upon the 25th day of April A. D. 1898, the plaintiffs appearing by Messrs. J. A. Ewing and Charles Cavender, and the defendants by Messrs. Thomas, Bryant & Lee, a jury herein being expressly waived by the parties hereto, and this cause being tried to the court.

Now on this 28th day of April, A. D. 1898, the hearing of this cause being concluded, and the court having heard all the evidence produced, as well on the part of the defendant as on that of the plaintiffs, and the arguments of counsel thereon, and not being sufficiently advised in the premises, doth take said cause under advisement; and doth order that the finding and judgment herein when rendered, shall be entered of record as of this day.

And the court, after further considering said cause, and being now fully advised in the premises, doth find the issues herein joined for the plaintiffs; and that they are the owners of and entitled to the possession of the ground described in the complaint.

It is therefore considered, ordered and adjudged by the court
28 that the said plaintiffs are the owners and entitled to the possession of the premises described in the complaint of the plaintiffs herein, viz., that portion of the placer claim called the Searl placer claim, situate in the California mining district, county of Lake and State of Colorado, bounded and described as follows: Beginning at corner No. 2, U. S. survey No. 6965, thence "A" S. 81° 36′ W. 490.9 feet; thence "B" S. 8° 30′ E. 100 feet; thence "C" S. 71° 26′ 27″ E. 61 feet; thence "D" S. 81° 36′ W. 13.58 feet; thence "E" N. 69° 51′ W. 178.12 feet; thence "F" S. 75° 35′ W. 144.2 feet; thence "G" S. 81° 36′ W. 23.7 feet; thence "H" N. 77° W. 135.6 feet; thence "I" N. 8° 24′ W. 58.8 feet; thence "J" S. 81° 36′ W. 150 feet; thence "K" N. 77° W. 161 feet; thence "L" N. 8° 24′ W. 1441.2 feet; thence "M" N. 81° 36′ E. 300 feet; thence "N" S. 8° 24′ E. 108.3 —; thence "O" N. 81° 36′ E. 300 feet; thence "P" S. 8° 24′ E. 70.1 feet; thence "Q" N. 81° 36′ E. 264.4 feet; thence "R" S. 50° 30′ E. 52.3 feet; thence "S" S. 8° 24′ E. 142.3 feet; thence "T" S. 81° 30′ W. 132 feet; thence "U" S. 50° E. 199 feet; thence "V" S. 8° 24′ E. 168.63 feet; thence "W" N. 81° 36′ E. 150 feet; thence "X" S. 50° E. 225.9 feet; thence "Y" S. 8° 24′ E. 703.87 feet to place of beginning; comprising 35.59 acres more or less.

And that they have and recover the same from the defendant, together with their costs laid out and expended; and that they may have execution therefor.

Now comes the defendant and excepts to the findings and judgment in the above cause, and prays an appeal to the supreme court of the State of Colorado; appeal allowed, conditioned upon the filing
29 of a bond with sureties to be approved by the clerk within thirty (30) days from the filing of judgment and decision in the sum of one thousand (1000.00) dollars; and defendant given ninety (90) days to prepare and tender bill of exceptions.

THOMAS A. RUCKER,
District Judge, Presiding at Request of
Hon. Frank W. Owers, Judge.

30 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court within and for said County.

THE ELI MINING & LAND COMPANY, a Corporation, etc.; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, a Corporation, etc., Defendant.
} Complaint.

Plaintiffs complain and allege:

I.

That the plaintiff, The Eli Mining & Land Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado;

II.

That the defendant, The Clipper Mining Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado;

III.

That on or about the 14th day of December, A. D. 1877, John Leahey, Thomas Starr, David Fulton, George Young, Andrew Baldridge, F. H. Edwards and J. B. Hall, each and all of them being at that time citizens of the United States over the age of twenty-one years, discovered and located, upon the unoccupied and unappropriated mineral domain of the United States, a certain placer mining claim, which is situated in what is known as the California
31 mining district, in the county of Lake and State of Colorado, and which is described by metes and bounds as follows:

Beginning at corner No. 37 of U. S. survey No. 255 thence N. 2° E. 422.8 ft.; thence N. 2° 35′ E. 440.5 ft.; thence N. 10° 50′ E. 560.7 ft.; thence N. 10° 37′ E. 845 ft.; thence N. 32° 6′ E. 483 ft.; thence N. 49° 13′ E. 155.5 ft.; thence N. 78° 42′ E. 142 ft.; thence S. 63° 38′ E. 260 ft.; thence S. 77° E. 1841 ft.; thence S. 12° W. 1420 ft.; thence S. 13° W. 1420 ft.; thence N. 77° W. 1841.4 ft.; thence N. 75° 35′ W. 430.3 ft. to place of beginning containing 157.02 acres of placer mining ground.

Variation 15° E.

IV.

That by virtue of said locations and divers certain mesne conveyances these plaintiffs have become and now are the owners of said placer mining claim and have and claim the legal right to occupy and possess said premises and enjoy the same and are entitled to the possession thereof by virtue of a full compliance of the local

laws and rules of miners in said mining district, the laws of the United States and of the State of Colorado, by preemption and purchase and by actual prior possession as a placer mining claim located upon the public domain of the United States.

V.

That on or about the 25th day of November, A. D. 1890, the defendant and its grantors wrongfully entered upon a portion or parcel of said placer claim, then and at that time in the quiet and peaceable possession of plaintiffs and their grantors and described as follows, to-wit:

32 Beginning at corner No. 2, U. S. survey No. 6965, thence "A" S. 81° 36′ W. 490.9 ft., thence "B" S. 8° 30′ E. 100 ft.; thence "C" S. 71° 26′ 27″ E. 61 ft.; thence "D" S. 81° 36′ W. 13.58 ft.; thence "E" N. 69° 51′ W. 178.12 ft.; thence "F" S. 75° 35′ W. 144.2 ft.; thence "G" S. 81° 36′ W. 23.7 ft.; thence "H" N. 77° W. 135.6 ft.; thence "I" N. 8° 24′ W. 58.8 ft.; thence "J" S. 81° 36′ W. 150 ft.; thence "K" N. 77° W. 161 ft.; thence "L" N. 8° 24′ W. 1441.2 ft.; thence "M" N. 81° 36′ E. 300 ft.; thence "N" S. 8° 24′ E. 108.3 ft.; thence "O" N. 81° 36′ E. 300 ft.; thence "P" S. 8° 24′ E. 70.1 ft.; thence "Q" N. 81° 36′ E. 264.4 ft.; thence "R" S. 50° 30′ E. 52.3 ft.; thence "S" S. 8° 24′ E. 142.3 ft.; thence "T" S. 81° 30′ W. 132 ft.; thence "U" S. 50° E. 199 ft.; thence "V" S. 8° 24′ E. 168.63 ft.; thence "W" N. 81° 36′ E. 150 ft.; thence "X" S. 50° E. 225.9 ft.; thence "Y" S. 8° 24′ E. 703.87 ft. comprising 35.59 acres more or less, as shown by plat marked "Exhibit B" filed on the — day of October, A. D. 1893, in the land office of the United States, at Leadville, in said State with the adverse claim of said plaintiffs against the entry of said last described premises, described in defendant's application for patent therefor, on file in said land office as U. S. survey lot No. 6965.

VI.

That defendant and its grantors have ever since hitherto wrongfully withheld the possession of said last described parcel of said placer claim from the plaintiffs to their damage in the sum of five thousand dollars ($5,000).

33 VII.

That this suit is brought in support of said adverse claim and that plaintiffs have necessarily disbursed and paid out the sum of two hundred and fifty dollars ($250.) for plats, abstracts and other papers filed in said land office with their said adverse claim and also a reasonable attorney's fee of $250 for the expense and labor of preparing said adverse claim.

Wherefore, plaintiffs demand judgment against the defendant:

1st. For the recovery of possession of said last described part or parcel of said placer claim;

2d. For the sum of five thousand dollars ($5,000.) damages;

3d. For the sum of five hundred dollars ($500) expended in support of said adverse claim;
4th. For costs of suit.

FRANK W. OWERS,
Attorney for Plaintiffs.

JNO. A. EWING, *Of Counsel.*

(Endorsement on the back:) 4580 In district court Lake county Eli Mining and Land Co. *et al. vs.* The Clipper Mining Co. Complaint Filed Nov. 23. 1893. Geo. P. Brown clerk by F. M. Goddard deputy Frank W. Owers, attorney at law, Leadville, Colo.

34 STATE OF COLORADO, *Lake County,* } *ss:*

In the District Court of the Fifth Judicial District of Colorado in and for the County of Lake.

THE ELI MINING & LAND COMPANY, a Corporation, etc.; A. D. Searl, F. G. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, a Corporation, etc., Defendant. } Summons.

The People of the State of Colorado to the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff-, in the district court of Lake county, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county; or, if served out of this county, or by publication, within thirty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you, according to the prayer of the complaint; and, if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of this State, then ten days additional to the time herein-above specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought to recover possession of a certain part or parcel of a certain placer claim described in the complaint filed herein; 2nd. For the sum of five thousand ($5000) dollars damages;
3d. For the sum of five hundred ($500) dollars expended in
35 support of said adverse claim; 4th. For costs of suit, as will more fully appear from the complaint in said action to which reference is here made; a copy of which is hereto attached. And you are hereby notified that if you fail to appear and to answer the said complaint, as above required, the said plaintiff- will apply for judgment by default against you, according to the prayer of said complaint.

Given under my hand and the seal of said court in said county, this 23d day of November, A. D. 1893.

[OFFICIAL SEAL.]

GEO. P. BROWN,
Clerk of District Court,
By F. M. GODDARD,
Deputy Clerk.

(Endorsed.)

STATE OF COLORADO, } ss:
Lake County, }

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within stated action, on this 24th day of November, A. D. 1893, on the within named defendant company, The Clipper Mining Company, a corporation, by personally delivering to and leaving with S. M. Carlton, general manager for the said defendant company, The Clipper Mining Company, a copy of said summons, together with a copy of the complaint in the action therein mentioned, thereto attached. The president, secretary, treasurer or other chief officer not found in my county after diligent search and inquiry.

P. J. KENNEDY, *Sheriff,*
By GEO. W. PELTER,
Deputy Sheriff.

36 (Further endorsed:) No. 4580. Summons. Lake county district court. The Eli Mining Company *et al.*, plaintiffs, *vs.* The Clipper Mining Company, defendant. State of Colorado, county of Lake, *ss.* Office of the sheriff of said county. Received Nov. 23d 1893, P. J. Kennedy, sheriff. By Thos. F. Dunn, deputy. Sheriff's fees: Service $ .75 mileage $ 20 Total, $ 95 Filed this 5th day of December A. D. 1893, Geo. P. Brown, clerk, by F. M. Goddard, deputy. F. W. Owers, att'y for pl't'ff.

STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING AND LAND COMPANY, a Corporation; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, a Corporation, Defendant.
} Demurrer.

Now comes the above named defendant and demurrers to the complaint herein, and for grounds of demurrer says: That the said complaint does not state facts sufficient to constitute a cause of action. And because the said complaint is uncertain and unintelligible in this that in the third paragraph of said complaint the plain-

tiffs claim to have located a single placer claim, and in the fourth paragraph it appears that there was more than one location; so that it cannot be determined from said complaint whether plaintiffs rely upon one location or several.

A. T. GUNNELL,
Attorney for Defendant.

37 (Endorsement on the back:) No. 4580 District court, Demurrer The Eli Mining & Land Company *vs.* The Clipper Mining Company Filed Dec. 13, 1893. Geo. P. Brown clerk. By F. M. Goddard deputy A. T. Gunnell attorneys for ——.

STATE OF COLORADO, }
County of Lake, } *ss:*

In the District Court.

THE ELI MINING & LAND COMPANY, a Corporation; A. D. SEARL, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, a Corporation, Defendant.

Comes now the above named defendant by its attorneys, and answering the complaint of the plaintiffs heretofore filed in said cause,

Admits the allegations contained in the first and second paragraphs of said complaint as to the incorporation and existence of the Eli Mining and Land Company and the Clipper Mining Company.

Denies that on the 14th day of December, A. D. 1877, or at any other time, John Leahey, Thomas Starr, David Fulton, George Young, Andrew Baldridge, F. H. Edwards and J. B. Hall, or any one else, discovered and located upon the unappropriated mineral domain of the United States a certain placer mining claim in the California mining district, State of Colorado, as described in said complaint and as set forth in paragraph III of said complaint; and concerning the allegations in said paragraph as to the citizen-
38 ship of said parties, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Denies that by virtue of said locations and divers mesne conveyances from the locators thereof, or by any ways or means whatsoever, the plaintiffs are the owners of said placer mining claim, or have any right or claim to occupy and possess said premises.

Denies that they are entitled to the possession of said premises described, or any part thereof, by virtue of a full compliance, or any compliance, with the rules and customs of miners, the laws of the United States, or of the State of Colorado.

Denies that said plaintiffs have any right, title or interest in or to any part or portion of said ground described in the complaint or have any title to the same, or are in any way interested therein:

Denies that on or about the 25th day of November, A. D. 1890, or at any other time, the defendant and its grantors, wrongfully entered upon a portion or part of any placer claim belonging to the plaintiffs herein.

Denies that at that time or any other time, the said placer claim was in the quiet and peaceable possession of said plaintiffs or their grantors.

Admits that the ground described in paragraph 5 of said complaint by metes and bounds, comprising 35.59 acres, more or less, in the California mining district, county of Lake and State of Colorado, was on the 25th day of November, A. D. 1890, and had been for a long time prior thereto in the possession of this defendant and its grantors and alleges that this defendant and its grantors
39 had at all times the right to occupy said premises, and were lawfully entitled to hold and occupy the same; and that none of the plaintiffs in this suit had any right or title to any part of portion of the same.

Deny that this defendant, by holding possession of said ground or otherwise, has ever damaged the plaintiffs in this suit in the sum of five thousand dollars, or any amount. And as to whether or not this suit is brought in support of an adverse claim, and the plaintiffs have expended any sum in preparing plats or are entitled to a reasonable attorney's fee, these defendants have not and cannot obtain sufficient knowledge or information upon which to base a belief, but deny that they are entitled to any attorney's fees or any sum whatever for preparing said plats or any papers in any adverse or other suit of any kind.

II.

And for a second and further defense this defendant alleges:

First. That it is a corporation organized and existing under and by virtue of the laws of the State of Colorado; that on or about the 14th day of December, A. D. 1877, the grantors of the plaintiff herein desirous of obtaining the title to certain valuable ground situated near the town of Leadville, and known by said parties to contain valuable mineral deposits of the character of which is commonly known as lode deposits; and further knowing that said ground would some time be valuable as town lots by reason of its proximity to the city of Leadville, devised a fraudulent scheme and conspiracy by which they determined to take up said land as a
40 placer mining claim, well knowing that the same was not ground that could be worked as a placer mine, and that it was not ground which was valuable for placer mining purposes; and in pursuance of said scheme and conspiracy they did attempt to locate upon said ground a certain placer mining claim described by metes and bounds, substantially as set forth in paragraph 3 of the complaint filed in this cause; and they thereafter filed application with the officers of the land office located at Leadville, in the county of Lake and district of Colorado, for a patent to said ground; that their application to receive a patent was contested, upon the

ground that said pretended placer claim was fraudulent; that said ground was never placer ground, was valuable only for the lode claims that it contained, and for townsite purposes; that a full hearing was had upon said contest before the officers of the United States land office at Leadville; and after a full hearing, said officers decided that said contest was well founded, and that the applicants for a patent to said ground as placer ground were not entitled thereto; that said ground was not placer, could not be taken up as a placer mining claim under the laws of the United States, and was not subject to entry under said laws as a placer mining claim, and that said ground was valuable only for the lode claims which it contained, and for townsite purposes; and said land officers refused to permit the so-called locators of said placer claim to enter the same as a placer mining claim; that the plaintiffs' grantors herein appealed from said decision of the land officers at Leadville to the Commissioner of the General Land Office of the United States at Washington, D. C. where another full hearing was had, and said Commissioner affirmed the decision of the officers of the
41 land office at Leadville, Colorado; that thereupon the grantors of the plaintiffs herein appealed from said decision of the Commissioner of the General Land Office of the United States to the honorable Secretary of the Interior where another full hearing was had and said Secretary of the Interior on the 13th day of November A. D. 1890 affirmed the decision of the Commissioner of the General Land Office, and by reason of said facts, the Government of the United States, by its proper officers has fully adjudicated and determined the fact to be that the land described in said complaint, and concerning which this suit is brought is not land which can be taken up as a placer mining claim, and that any attempted entry of the same as placer mining ground is void and of no effect, and has expressly determined that the title set up in said complaint claimed by the grantors of the plaintiffs was void and of no effect, but has been cancelled and held for naught by the proper officers of the United States, by reason of which fact the said plaintiffs have no right to set up the same against this defendant or any one else.

III.

This defendant further alleges that on or about the 25th day of November A. D. 1890 its grantors, being all of them citizens of the United States, went upon the unoccupied public mineral domain of the United States, in the California mining district, county of Lake and State of Colorado, and located thereon five certain lode mining claims, known respectively as the Clipper, Congress, Capitol, Villa and Acme, and in all respects complied with the provisions of the rules and customs of the miners in said mining district, with the laws of the United States and of the State of Colorado in regard to the discovery of mineral, the posting of stakes, the filing of a location certificate, the sinking of a discovery shaft, the doing of
42 the assessment work, and all other acts required by said rules and customs in said laws; and that since said time this de-

fendant and its grantors have fully complied with the provisions of said acts by doing the annual assessment upon each of said claims, and that afterwards the original locators of said claims conveyed the same to this defendant and that this defendant has and claims the legal right to occupy and possess all of said mining claims, and is entitled to the possession thereof by virtue of a full compliance with the local laws and rules of miners in said mining district, with the laws of the United States and of the State of Colorado, by purchase and preemption and by actual prior possession as lode mining claims located on the public domain of the United States and that the premises sued for in said complaint are parcel of said lode mining claims, and are the property of this defendant; and said plaintiff is not entitled to the ownership or possession of said property; and that at the time the said pretended placer mining claim of the complainants herein was attempted to be located the lodes upon which the above mentioned lode mining claims were located were known lodes; that the locators of said placer mining claims knew that said lodes existed within said ground, and the same were well known lodes and were not subject to location as a placer mining claim, and could not be embraced within the limits of the so-called placer mining claim of the plaintiffs herein.

IV.

And for a further and separate defense the defendant says that heretofore and on to-wit the 10th day of November A. D. 1882, the above-named plaintiff, A. D. Searl, the grantor of his co-
43 plaintiffs above named, being then and there by divers mesne conveyances the alleged and pretended owner of the said Searl placer as described in said complaint made his amended application for a patent to the same, it being amended survey No. 435, in the United States land office situated at Leadville, Colorado, in which district the territory herein involved was situated; that said amended application for patent was thereafter by the register and receiver of said land office rejected and cancelled for the reason that the territory therein embraced was not placer ground or subject to location as such, and because the said plaintiff Searl and his grantors had not complied with the law in making said pretended placer location; that the said Searl appealed from such decision of the said register and receiver to the Commissioner of the General Land Office, who thereafter and on, to-wit, the 6th day of March A. D. 1886, after a full and legal hearing, sustained the decision of the said register and receiver; that the said Searl thereafter appealed from such decision of the Commissioner to the Secretary of the Interior of the United States, and thereafter and on, to-wit, the 13th day of November, A. D. 1890, the said Secretary of the Interior fully affirmed and upheld the decisions of the register and receiver and of the Commissioner aforesaid, whereby the said pretended location of the Searl placer and the application for patent thereon was wholly cancelled, set aside and for naught held, and the same became and

was wholly unappropriated public domain so far as the rights or claim of title of the plaintiff were concerned and was not subject to placer location; that thereafter and on, to-wit, the 25th day of November, A. D. 1890, the defendant company, by
44 its grantors, each of whom were then and there citizens of the United States over the age of twenty-one years, went upon the said premises and performed all of the necessary acts in compliance with the mining regulations of said district and the statutes of the United States and of the State of Colorado necessary to and did, in fact, locate the Clipper, Congress, Capital, Villa and Acme Lode claims upon lodes or veins then and for a long time prior thereto known to exist within the limits of said pretended placer; that ever since said location this defendant and its grantors by the filing of location certificates, the marking of boundaries, the sinking of shafts, and the doing of assessment work has fully complied with the law in each and every particular and now is and ever since hitherto has been entitled to the ownership and possession of said lode claims; that said plaintiffs have never, since the rendering of the decision of the Secretary of the Interior aforesaid canceling their application, done or performed the necessary or any acts to make a valid placer location under the law upon said premises; that ever since the said 25th day of November, A. D. 1890, the defendant company and its grantors have been in the open and undisturbed possession of the lodes, ledges and deposits which ever since said date have been well known to exist upon each of said Clipper, Congress, Capital, Villa and Acme Lode claims and upon which they as hereinabove described are located.

And the defendant further says that the said lodes, veins and deposits were well known to exist within the limits of the said pretended Searl placer at all the times herein mentioned and especially at the time the plaintiff Searl made his application for a
45 patent to said placer, and yet, notwithstanding the fact that said lodes were known to exist and the plaintiff Searl knew of their existence within the limits of said placer claim, his said application for patent for such placer claim did not include an application for any of the said veins or lode claims whereby the said Searl and these plaintiffs fully waived any claim or right thereto and cannot thereafter be heard in any claim of right to the possession of the said veins or of the lode claims of this defendant under their said placer location.

V.

And the defendant company, for a further and separate answer, says: That heretofore and on, to-wit, the 10th day of November, A. D. 1882, the above-named plaintiff, A. D. Searl, being then and there a grantee by divers mesne conveyances of the parties alleged in the plaintiffs' complaint to have been the locators of the said alleged Searl placer on behalf of himself and as the grantor of his co-plaintiffs made his amended application for a patent to the said placer, the same being amended survey No. 435; that at the date of

said application for patent there were several known lodes, ledges and veins within the limits of said pretended placer claim and that said application for a patent to said placer claim did not include the application for patent to such veins or lodes; that thereafter the grantors of the defendant company, each being then and there a citizen of the United States over the age of twenty-one years, on or about the 25th day of November, 1890, by means of five shafts sunk in the ground to a depth of not less than ten feet showing the said known lodes well defined in rock in place, located
46 thereon the Clipper, Congress, Capital, Acme and Villa Lode mining claims by a full compliance with the miners' regulations of said district, the statutes of the United States and of the State of Colorado, and caused the boundaries thereof to be marked by substantial posts set in the ground in strict compliance with the law and said regulations, and thereafter and on, to-wit, the same day, filed their location certificates thereto with the county clerk and recorder of Lake county, Colorado, giving the names of the locators, the names of the claims and a sufficient description of the said claims by metes and bounds; that ever since said date the defendant company and its grantors have complied with the law in the doing of assessment work thereon and have been in full, undisturbed and complete enjoyment of said lode claims and of said known lodes.

VI.

And for a further and separate defense the defendant says that it is now the owner of and in the undisturbed possession of the Clipper, Congress, Capital, Acme and Villa Lode claims situate in the California mining district, county of Lake and State of Colorado; that said locations were made on or about the 25th day of November, A. D. 1890, by the grantors of this company, each being then and there a citizen of the United States over the age of twenty-one years, who discovered within the limits of each of the above named five claims a well-defined lode, ledge or vein of mineral in rock in place, and in each of said claims sunk a shaft thereon of not less than ten feet below the surface showing said lode, caused a discovery stake to be placed on each of said claims at the several points of discovery thereof, fixed the boundaries
47 of said claims by substantial posts properly marked and caused the location certificate in and to said claims to be filed giving the name of the lode, the names of the locators, and the number of feet claimed on each side of the discovery shaft and described the claims and each of them by metes and bounds; that all of these acts and everything else necessary to a full compliance with the law were done in the proper manner as provided by statute and miners' regulations on or about the 25th day of November, A. D. 1890; that thereafter this defendant company made its application for a patent upon said lode claims in the land office of the United States at Leadville for the district in which said lode claims are situated; that thereafter and while said applications for patent were

pending the plaintiffs brought this their so-called adverse suit claiming the said lodes and the territory embraced in said locations as the property of the plaintiffs under and by virtue of their alleged ownership of a certain pretended placer claim called the Searl placer as is more properly described in their said complaint. The defendant company says that the several lodes and veins upon which its several claims are located are now each and all well known to exist within the pretended boundaries of said placer claim and were known to exist at the time of bringing this suit by the plaintiffs that they are now and ever since hitherto have been in the possession of the defendant company which has been engaged ever since their discovery and location in working and developing them and that the plaintiffs are not entitled either to the possession or ownership thereof under their said pretended placer and have never located or attempted to claim said veins by virtue of any lode locations.

48 Wherefore, the defendant company prays that the plaintiffs' cause of action be dismissed and that it be allowed to go hence with its costs in this behalf expended.

THOMAS, BRYANT & LEE,
Attorneys for Defendant.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

H. H. Lee being first duly sworn upon his oath deposes and says, that he is one of the attorneys for the defendant company in the above entitled cause, that he has read the foregoing answer and knows the contents thereof and that the things therein contained are true to the best of his knowledge and belief, except those things stated upon information and belief, as to which he believes it to be true.

—— ——.

Subscribed and sworn to before me this — day of February, A. D. 1896.

My commission expires —.

——— ———,
Notary Public.

The above answer, or the original answer was filed in the District court of Lake county, State of Colorado Feb'y 6th, 1896.

49 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING AND LAND COMPANY, a Corporation; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, a Corporation, Defendant.

Now comes the plaintiffs in the above entitled action and demur to the second defense set forth in the answer of the defendant herein and for cause of demurrer allege:

1. That the same does not state facts sufficient to constitute a defense to the complaint in this action;

2. And demur to the third defense in said answer, beginning after the fourth line on the fifth page thereof, for the reason that the facts therein stated are not sufficient to constitute a defense to such action, and also demur to the same for the reason that this suit is brought in support of an adverse suit, and that the ground in controversy in this action is the Capitol, Clipper, Congress and Castle Lode mining claims and involves the title only to the ground therein described; and that there is another suit pending in this court between the plaintiffs herein and other parties concerning the title to the said pretended Villa and Acme Lode mining claims.

50 3. And demur to the fourth and separate defense set forth in the answer of defendants herein and for cause of demurrer allege: That the same does not state facts sufficient to constitute a defense to the complaint herein;

4. And demur to the fifth defense set forth in said answer for the reason that the same does not state facts sufficient to constitute a defense to the complaint of the plaintiffs herein;

5. And demur to the sixth defense set forth in said answer and for cause of demurrer allege that the facts therein stated do not constitute a defense to the complaint of the plaintiffs herein;

6. And for other good and sufficient reasons and because this suit is brought in support of an adverse claim adversing the alleged Capitol, Clipper, Congress and Castle Lode mining claims and the ground described in said alleged claims is the only ground in dispute in this action; and because the said pretended Villa and Acme Lode mining claims, the title to which is in dispute in another action pending in this court;

7. And for other good and sufficient reasons appearing upon the face of said answer.

JOHN A. EWING,
CHAS. CAVENDER,
Attorney- for Plaintiffs.

(Endorsement on the back:) Case No. 4580. In the district court of Lake county. The Eli Min. & Land Co. *et al. vs.* The Clipper Mining

Company. Demurrer. District court Lake county. Filed Feb'y 17th, 1896. Jno. H. Dunn, clerk. By James J. Connell, deputy. John A. Ewing, Chas. Cavender, att'ys for pl'ffs.

51 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING & LAND COMPANY ET AL., *Defendants,*
vs.
THE CLIPPER MINING COMPANY, Defendant.

Comes now the above named defendant, by its attorneys, and amending its answer heretofore filed, alleges that in all places in said answer where the lode mining claims of the defendant are referred to said answer is made to read six lode mining claims, known respectively as the Clipper, Congress, Capital, Castle, Villa and Acme.

THOMAS, BRYANT & LEE,
Attorneys for Defendant.

Original amendment to answer filed Feb'y 12th, 1896.

52 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING & LAND COMPANY, Plaintiff,
vs.
THE CLIPPER MINING COMPANY, Defendant.
} Case No. 4580. Demurrer.

Comes now the above named plaintiff and moves the court to strike from the files the so-called amendment to the answer of the defendant herein, which was filed on February 12th, 1896, for the reason that said amendment was filed without leave of court being first had and obtained, and because the same is ambiguous and insufficient to raise any issue whatsoever.

JOHN A. EWING,
Attorney for Plaintiff.

(Endorsement on the back :) Case No. 4580. In dist. court. The Eli Min. & Land Co. *vs.* The Clipper Min. Co. Motion. District court Lake county. Filed Feb. 26, 1897. Jno. H. Dunn clerk, per —— —— deputy. J. A. Ewing, att'y for pl'ff.

53 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING & LAND COMPANY, a Corporation; A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, a Corporation, Defendant.
} Case No. 4580. Reply.

Come now the plaintiffs in the above entitled action and file this their reply to the new matter set up in the answer of the defendant, The Clipper Mining Company, and for reply to the second and further defense therein contained,

1. Admit that on or about the 14th day of December, A. D. 1877, the grantors of the plaintiffs herein were desirous of obtaining title to certain valuable ground situate near where the city of Leadville now stands, but allege the fact to be that at said time there was no town near the said ground described in the complaint herein;

2. Deny that said or any ground described in the complaint herein or sued for in this action was known by the said parties, or either or any of them, to contain valuable mineral deposits of the character which is commonly known as lode deposits, and deny that the grantors of the plaintiffs herein, or either or any of them, knew or could know at said time that the said ground described in the
54 complaint herein, or any part or portion thereof, contained any lode or lodes whatsoever or contained mineral deposits of the character which is commonly or otherwise known as lode deposits, and deny that they further knew that said ground would some time or at any time be valuable as town lots by reason of its proximity to the city of Leadville;

3. Deny that the said grantors of the plaintiffs herein, or either or any of them, devised a fraudulent or any scheme or conspiracy in and by which they, or either or any of them, determined to take up said land or any land as a placer mining claim, or that they well knew or knew at all that the same was not ground that could be worked as a placer mine or knew that it was not ground which was valuable for placer mining purposes;

4. Deny that, in pursuance of said scheme or any scheme or conspiracy whatsoever, they did locate or attempt to locate upon said ground or upon the ground described in the complaint herein;

5. Admit that they thereafter filed an application with the officers of the United States land office, located at Leadville in the county of Lake and district of Colorado, for a patent to said ground, and admit that their said application for a patent was contested;

6. Admit that one of the grounds of said contest was that said placer claim was fraudulent and that said ground was never placer ground; but deny that any ground of said protest was, or that said

application was contested on the ground, that said premises were valuable only for the lodes therein contained;

55 7. Admit that one of the grounds of contest was that said ground was valuable for town site purposes, and allege the fact to be that a hearing was had by the United States land office and it was decided that the said ground was not valuable for town-site purposes, and further, it was decided by the said land department that the said ground was mineral land; but deny that it was ever decided or held that said ground was valuable only for lode claims contained therein or for lodes therein contained;

8. Admit that a hearing was had upon said contest before the officers of the United States land office at Leadville, Colorado; but deny that after a full hearing, or any hearing that was fair, impartial or honest, said officers decided that said contest was well founded or that the applicants for a patent to said ground as placer ground were not entitled thereto because said ground was not placer ground or that said ground was not placer ground or could not be taken up as placer mining claims under the laws of the United States, or that the same was not subject to entry under said laws as a placer mining claim, or that said ground was valuable only for the lode claims which it contained, or that the same was valuable only for town-site purposes; but allege the fact to be that at the time of said hearing there was a great prejudice existing among certain persons in and near the city of Leadville against these plaintiffs and their grantors, said prejudice being based largely upon the fact that a large number of such persons sought to locate upon and build houses upon and obtain title to the ground in controversy in this action and the

56 ground contained in said placer claim, and that such being the fact, at said hearing before the said United States land office by false and perjured testimony of many persons who had an interest therein and by a fraudulent collusion between said persons and certain agents of the Government of the United States and the said register and receiver of the United States land office at Leadville, Colorado, the said United States land officers were induced to, and did, fraudulently, wrongfully and unlawfully and without any right whatsoever and in violation of the rights of these plaintiffs and their grantors, hold that said false, perjured and fraudulent testimony heard before them was true, and did also hold that said ground had not been shown to be placer ground at that time and had not been sufficiently improved to entitle said party to a patent at that time, all of which alleged facts so held by the said register and receiver of the United States land office were held by them fraudulently, dishonestly and corruptly and against the rights of these plaintiffs and their grantors, the said register and receiver well knowing at said time that the findings made by them were false, fraudulent, corruptly made and untrue, and that by reason of the facts aforesaid and the said fraud on the part of said register and receiver and on the part of certain persons colluding with them and certain persons as agents of the Government of the United

States, who were bribed, as these plaintiffs are informed and believe and so charge the fact to be, to make false reports as to the condition of said land, a ruling was had by the said register and receiver in which it was held that said ground had not been proven at
57 that time to be placer ground and that the plaintiffs herein and their grantors had not done sufficient work thereon at that time in order to obtain a patent, and for that reason and for no other the said land department refused to enter the same as a placer mining claim;

9. Admit that the grantors of the plaintiffs herein appealed to the Commissioner of the General Land Office at Washington, D. C., but deny that there was a full hearing had before the said Commissioner of the General Land Office at Washington, and allege the fact to be that the said Commissioner of the General Land Office, acting under false reports made to him by certain agents of the Government of the United States, who were sent to investigate the same and who had been influenced by certain persons in Leadville, and not having the witnesses before him, affirmed the said fraudulent decision of the said register and receiver.

10. Admit that the same was passed upon by the Secretary of the Interior on the 13th day of November, A. D. 1890, and allege that the said Secretary of the Interior, not knowing of said fraud and fraudulent practices, affirmed said decision; but deny that by reason of the facts aforesaid the Government of the United States, by its officers, has fully or otherwise adjudicated or determined the fact to be that the land described in the complaint herein, or concerning which this suit is brought, is not ground that can be taken up as a placer mining claim, and deny that any attempted entry or
58 any entry of the same as placer mining ground is void or of no effect, and deny that said Land Department has expressly or otherwise determined that the title set up in the complaint as claimed by the grantors of the plaintiffs herein was or is void or of no effect, and deny that the same has been cancelled or held for naught by the proper or any officers of the United States, and deny that by reason of said alleged fact or any fact, these plaintiffs have no right to set up their title herein as against the defendant herein or any one else;

11. Answering the third paragraph, or defense, set up in said answer of the defendant herein, beginning on the 5th page of said answer and ending near the middle of the 6th page thereof, these plaintiffs deny each and every allegation therein contained.

12. Answering the fourth paragraph of said answer of the defendant herein, beginning on the 6th page thereof and entitled "for a further and separate defense," these plaintiffs admit that on or about the 10th day of November, A. D. 1882, A. D. Searl, being the owner of the Searl placer as described in the complaint herein made his amended application for a patent to the same, it being amended survey No. 435, in the United States land office at Leadville, Colorado;

13. Admit that said amended application for patent was there-

after by the register and receiver of the said United States land office at Leadville, Colorado, rejected and cancelled, but deny that it was rejected and cancelled for the reason that the territory therein embraced was not placer ground or subject to location as such, or because the said plaintiff, A. D. Searl, and his grantors had
59 not complied with the law in making said placer location; but allege the fact to be that said alleged rejection and cancellation was made because it was claimed by the said register and receiver of the United States land office at Leadville, Colorado, that the requirements of the statute had not been at that time fully complied with, with reference to improvements made thereon in order to entitle the said A. D. Searl to a patent;

14. Allege that said register and receiver of the said United States land office rejected and refused to receive said application of the said A. D. Searl for the reason that they were prejudiced and biased against the said A. D. Searl and had been induced by numerous persons, who sought to obtain title to the said ground and who had built houses thereon, to reject said application; that the said register and receiver fraudulently and without any right and in violation of the evidence introduced before them and in violation of the law and by a wrongful and fraudulent pretended finding of facts and by pretending to find facts that did not exist, rejected said application;

15. Admit that the said A. D. Searl appealed from the said wrongful decision of the register and receiver to the Commissioner of the General Land Office who reviewed said testimony and without hearing further testimony and without being fully advised as to the fraudulent character of the decision of the said register and receiver and being influenced thereto by certain bribed agents of the Government of the United States, affirmed the said wrong-
60 ful decision of the register and receiver of the United States land office at Leadville, Colorado, on the 6th day of March, A. D. 1886; but deny that the said Commissioner of the General Land Office affirmed the same after a full or any legal hearing thereon;

16. Admit that the said A. D. Searl thereafter appealed from said pretended decision of the Commissioner of the General Land Office to the Secretary of the Interior of the United States and that thereafter the Secretary of the Interior affirmed and upheld the wrongful decision of the register and receiver and the wrongful decision of the said Commissioner; but allege that he upheld the same without knowing of the fraudulent decision and of the false and fraudulent findings made by the said register and receiver;

17. Deny that by said decision of the Secretary of the Interior or by the or any decision of the Commissioner of the General Land Office or by the said wrongful decision and the false and fraudulent findings made by the register and receiver of the United States land office at Leadville, Colorado or by any decision whatever, the said location of the said Searl placer, as set forth in the complaint herein, was wholly or at all cancelled or set aside or for naught held, or that by any decision whatsoever the same became, was or is wholly or other-

wise unappropriated public domain so far as the rights or claim of title of the plaintiffs and their grantors herein are concerned or otherwise and deny that the same was not subject to placer location, and deny
61 that the said register and receiver or the Commissioner of the General Land Office or the Secretary of the Interior of the United States or any constituted authority of the United States ever so held or so decided; but allege that the decision made by the Land Department was that the said plaintiffs herein and their grantors or the said A. D. Searl had not complied with the law sufficiently to entitle them to a patent at the time said application was made and that it had not been shown by the evidence adduced at that time that the said ground was distinctly valuable for placer purposes, and allege that no decision whatever was ever made in or by which it was decided, determined or adjudicated in any manner whatsoever that the said location of the Searl placer claim or the ground in the complaint herein described as the Searl placer was not properly located or was not placer ground;

18. Deny each and every other allegation contained in said 4th paragraph and further defense of said answer of the defendant herein not herein specifically admitted.

Answering the fifth paragraph of said answer beginning on page 8 thereof, these plaintiffs admit that on or about the 10th day of November, A. D. 1882, the plaintiff herein, A. D. Searl, made his amended application for patent to the ground described in the complaint herein as the Searl placer, the same being amended survey No. 435, but deny each and every other allegation contained in said fifth paragraph of said answer.

20. Answering the sixth paragraph of said answer of the defendant herein, these plaintiffs deny each and every allegation therein contained, except the allegation that these plaintiffs brought
62 their adverse suit against the said defendant herein.

Wherefore, plaintiffs pray judgment as prayed for in the complaint.

JOHN A. EWING,
Attorney for Plaintiffs.

STATE OF COLORADO, }
County of Lake, } ss:

A. D. Searl, being first duly sworn on his oath deposes and says: That he is one of the plaintiffs in the above entitled cause; that he has read the above and foregoing reply to the new matter set up in the answer of the defendant herein; that the matters and things therein contained are true of his own knowledge, except those matters therein stated on information and belief and as to those he believes them to be true.

A. D. SEARL.

Subscribed and sworn to before me this 6th day of November A. D. 1897.

A. TREGO,
Notary Public.

[SEAL.]

Original reply filed Nov. 8th, 1897.

5—76

63 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING & LAND COMPANY, A. D. SEARL, F. C. SCHROEDER, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, Defendant.

Comes now the above named defendant, The Clipper Mining Company, by its attorneys, Thomas, Bryant & Lee, and represents unto the court that the above entitled cause is an adverse suit heretofore begun between these plaintiffs and the Clipper Mining Company, No. 4580, for the purpose of establishing plaintiffs' prior right and title to what is known as the Searle placer as against certain lode mining claims duly located by these defendants as is more fully and particularly set forth in the pleadings of the parties on file in said cause.

Your petitioner further says that the legality and validity of the plaintiffs' title to the so-called Searle placer will be an important issue in the trial and determination of said cause and that the Honorable Frank Owers, the district judge within and for the aforesaid district in which said cause is pending and before whom the same would probably come for trial, was attorney for the plaintiffs, or one or more of them, and counseled and advised them in matters and things affecting the validity of the so-called Searle Placer in certain proceedings heretofore had in the several land
64 departments of the United States Government in which the said plaintiffs or one or more of them were applicants for patent from the Government of the United States to the said placer, and that by reason of such facts the said the Honorable Frank Owers would be prejudiced against this defendant and would be an improper person to sit as judge in the trial and hearing of said cause.

Wherefore your petitioner respectfully asks that a change of venue may be granted to it of said cause and that the same be removed to some other court of proper jurisdiction to be heard, tried and determined.

All of which is respectfully prayed for.

THOMAS, BRYANT & LEE,
Att'ys for Defendant.

(Endorsement on the back:) 4580 District court Lake county The Eli M. & L. Co. *et al. vs.* The Clipper Mg. Cos. Petition — change of venue District court Lake county Filed Nov. 6 1897 Jno. H. Dunn clerk, per —— —— deputy. Thomas, Bryant & Lee, attorneys for def't.

65 STATE OF COLORADO, } ss:
County of Lake, }

THE ELI MINING AND LAND COMPANY, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, Defendants.
} Affidavit of S. M. Carleton.

S. M. Carleton being first duly sworn deposes and says that he is the manager of the said The Clipper Mining Company, and that he acts in behalf of said company and is interested in the result of the above action by reason of his official connection therewith;

That he is informed and believes and upon this information and belief states the fact to be that the present judge of the fifth judicial district, the Hon. Frank W. Owers, has been for years past the legal counsellor, adviser and attorney for the said A. D. Searl, and the said The Eli Mining and Land Company in all matters requiring legal attention and especially in a certain action entitled to-wit; The Eli Mining and Land Company *vs.* The Clipper Mining Company, the same being known as case No. 4580, the complaint in which was filed on the 23rd day of November, 1893. And that in the said suit the judge of said fifth judicial district court appears as attorney for the plaintiff; and that the parties thereto and the issues involved are identical and similar with the parties and issues involved in this action; that he believes the said judge of said fifth judicial district is by law disqualified from trying the above
66 entitled cause and that justice and equity require that the said action be transferred to some other judicial district and tried before some other judge.

S. M. CARLETON.

STATE OF COLORADO, } ss:
County of Lake, }

Subscribed and sworn to before me this 6th day of October, A. D. 1897.

FRANK E. MERCEREAU,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires July 20, 1899.

(Endorsement on the back:) No. 4580 The Eli Mining & Land Co. *et al. vs.* The Clipper Mining Co. Affidavit District court Lake county. Filed Nov. 6, 1897. Jno. H. Dunn clerk, per —— —— deputy. Thomas, Bryant & Lee, defendant's attorneys.

67 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING AND LAND CO., A. D. SEARL, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING COMPANY, Defendant.
} No. 4580. Notice.

To the above named plaintiffs and J. A. Ewing, their attorney:

Please take notice that a motion has been filed in the above entitled cause and court for judgment against you upon the pleadings filed in this cause, for the reasons stated in said motion, a copy of which is hereto attached:

And that upon the 31st day of January A. D. 1898 at ten o'clock in the forenoon or as soon thereafter as counsel can be heard at the district court room in said county, said motion will be called up for hearing and determination.

THOMAS, BRYANT & LEE,
Defendant's Attorneys.

Received a copy of the above notice together with a copy of the motion hereto attached this 29th day of Jan. A. D. 1898.

68 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING AND LAND CO., A. D. SEARL, F. C. Schroeder, A. F. Britton, and H. J. Gray, Plaintiffs,
vs.
THE CLIPPER MINING CO., Defendant.
} No. 4580. Motion.

Comes now the above named defendant and moves the court herein for judgment against the plaintiffs on the pleadings filed in this cause, for the following reasons:

1. There is no denial by the plaintiffs of the new matter set up by way of defense in defendant's answer;

2. Because plaintiffs' replication does not state facts sufficient to constitute a defense to the new matter and defenses set up in defendant's answer;

3. Because said replication is sham, frivolous and irrelevant, and for other good and sufficient reasons appearing on the face of said pleadings.

THOMAS, BRYANT & LEE,
Defendant's Attorneys.

STATE OF COLORADO, } ss:
County of Lake, }

R. D. McLeod, being first duly sworn deposes and says that he is over the age of 21 years, that he is not interested in nor a
69 party to this action, that he served the annexed motion and notice upon the said attorney for the plaintiffs, Mr. J. A. Ewing, by delivering to and leaving with the said J. A. Ewing, personally, at his office in Leadville, a true copy of said motion and notice, upon the 29th day of January, A. D. 1898.

R. D. McLEOD.

Subscribed and sworn to before me this 31st day of January, A. D. 1898.

[OFFICIAL SEAL.] JNO. H. DUNN,
Clerk Dist. Court,
By JAMES J. CONNELL, *Deputy.*

(Endorsement on the back:) No. 4580 The Eli Mining & Land Co. *vs.* The Clipper Mining Co. Motion and notice District court Lake county Filed Jan. 31, 1898 Jno. H. Dunn clerk, per James J. Connell deputy. Thomas, Bryant & Lee, defendant's attorneys.

70 STATE OF COLORADO, } ss:
County of Lake, }

I, John H. Dunn, clerk of the district court of the fifth judicial district of the State of Colorado, held within and for the county of Lake, do hereby certify that the above and foregoing is a true, full and correct transcript of the record, summons, demurrer to complaint, demurrer to answer, motion to strike amendment to answer from files, petition and affidavit for change of venue, and motion for judgment on the pleadings, and the complaint in the therein entitled action, the same being numbered 4580 on the dockets of said court, and being the action of The Eli Mining & Land Company, a corporation, etc., A. D. Searl, F. C. Schroeder, A. F. Britton and H. J. Gray, plaintiffs, against The Clipper Mining Company, a corporation, etc., defendant, as the same now remains of record in my said office.

And I do hereby further certify that the answer, amendment thereto and reply have inexplicably been lost or mislaid, and that the copies hereto attached are true, perfect and complete copies of the office copies furnished by the attorneys in this litigation.

And I further certify that the bill of exceptions hereto attached is the bill of exceptions filed in this office.

Witness, my hand and the official seal of said court at Leadville, this 8th day of September, A. D. 1898.

[SEAL.] JOHN H. DUNN,
Clerk District Court,
By JAMES J. CONNELL, *Deputy.*

71 STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI MINING & LAND COMPANY, a Corporation, &c.; A. D. Searl, F. C. Schroeder, A. T. Britton, and H. J. Gray, Plaintiffs,
v.
THE CLIPPER MINING COMPANY, a Corporation, &c., Defendant.
} No. 4580.

Be it remembered, that the above entitled cause came on for trial on the 25th day of April, A. D. 1898, before the court, a jury being expressly waived by both of said parties said trial was had to the court.

The plaintiffs to maintain the issues upon their behalf, had sworn as a witness J. B. Hall, who testifies that he had lived in Colorado since 1860. He was then asked about the location of the property described in the complaint as the Searl placer, whereupon the defendant, by its counsel, objected to any and all testimony concerning the location of said Searl placer, or the character of the ground covered thereby, or any testimony concerning the title claimed by the plaintiffs under said Searl placer location for the reason that under the issues of this case as made up the title had been declared invalid by the Land Office of the United States, and for the further reason that under the pleadings and the issues, said testimony was immaterial, irrelevant and incompetent.

72 But the said objection of the defendant was overruled, to which ruling of the court, defendant, by its counsel, then and there saved an exception.

Thereupon the said witness testified as to locating the Searl placer, in December, 1877; that he was one of the locators; that said ground was placer ground: that himself and the other locators were citizens of the United States; that the assessment work, the marking of the boundaries, the filing of the location certificate and other acts required by the law of the State of Colorado and of the United States at that time concerning the location of a placer mining claim were fully complied with.

C. G. Arnold, A. D. Searl, Robert B. Estey, A. D. Searl, Jr., L. O. House, Joseph W. Dilks, W. R. Macomb and Jesse F. McDonald were then sworn in evidence on behalf of the plaintiffs and did testify substantially as the witness Hall had testifies concerning the ground covered by the said Searl placer being placer mining ground, concerning the marking of the boundaries and also that work annually amounting to $100 had been done from 1877 down to the bringing of the suit, and also from that time to the trial of this cause, and the plaintiffs proved all the necessary acts necessary to make a valid placer location.

The plaintiffs also had sworn as a witness Jesse F. McDonald who

in addition to the other testimony above mentioned introduced a map which he had prepared and which he swore was correctly made showing the location of said placer and other claims, and said map is hereto attached and marked Exhibit No. 1.

73 The plaintiffs then introduced in evidence deeds and conveyances which duly conveyed the title originally acquired by said placer location to the plaintiffs in this suit so far as the paper title is concerned, and thereupon the plaintiffs rested.

The defendant to maintain the issues upon its part then had sworn as witnesses John McNulty, A. C. Saltzman, Frank Fox, J. Lowney, Thomas J. Rinker, J. H. Reed, Duncan McClelland, Joseph Doyle, William Emery, Robert Berry and Timothy Kay. These witnesses testified that they had each examined, or watched others examine, the ground in question from two to three hours each or longer; that the surface of said ground was covered with wash or debris; that in washing or panning said ground only colors had been found; some of said witnesses testified that said ground was not placer ground, and in their opinion could not be made to pay as placer ground; others of said witnesses testified that they could not express an opinion as to whether said ground was placer ground or not; and the defendant also had sworn as witnesses J. W. Newell, Joseph Doyle and J. K. Carleton, who testified that they had been familiar with the ground since 1880, and that since that time valuable lode deposits had been discovered and known in the region in which this placer is located, and the said J. K. Carleton testified that he believed that there was one large mineral bearing vein which underlaid the whole of said placer, dipping under the same, that he knew of evidences of said vein extending under said placer from workings in the Lucy B. Hussey, and other lodes as far back as 1881; and said Newell, Doyle and Carleton testified that said lode or vein had, since 1895, been traced and

74 discovered under said placer. Said witnesses, together with S. M. Carleton also testified to the discovery and location of the Castle, Clipper, Congress, and Capital Lode mining claims; that said claims were located on the 25th of November, 1890; and said Carletons testified that at that time the said mineral bearing vein was known to underlie said placer; and said Newell testified that to his knowledge a valuable discovery of mineral in said lodes was made in 1895; and said three witnesses testified that said claims had all had work performed upon them in the shape of a shaft sunk to the said mineral bearing vein from which a great many thousand dollars worth of ore had been extracted and shipped to the smelter; that the discovery shafts had been sunk upon each of said claims, the boundaries had been marked, the location certificates had been prepared and filed as required by the statutes of the State of Colorado, and that the statutes of the said State and of the United States, relating to the discovery, location, recording and annual work upon each of said claims had been in all things fully complied with.

The defendant, S. M. Carleton, also identified a certain map showing the location of the ground in controversy, including the placer

claims and the lode claims in suit; which said map is hereto attached and marked Exhibit 2.

And thereupon the defendant offered in evidence a certified copy of the decision of the Commissioner of the General Land Office of the Secretary of the Interior and of the proceedings had thereon in the matter of the application of A. D. Searl for patent upon the said placer mentioned in the complaint herein and known as the Searl placer; which said papers were objected to by counsel for the
75 plaintiffs upon the ground that they were immaterial, incompetent and irrelevant, which said objection was by the court overruled, and said record was introduced in evidence, and was as follows, to wit:

Which said certified copy was in words and figures as follows to wit:

In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. D. Searl upon His Application for a United States Patent, No. 266, on Survey No. 435 of the Fairplay Land District, Colorado, Commonly Called the "A. D. Searl Placer."

To the register and receiver of the United States land office at Leadville, Colorado, and to the Hon. Commissioner of the General Land Office of the United States, at Washington, D. C.:

Your petitioner and protestant Mark H. Sears, who files this petition and protest as well for himself as for two hundred *bona fide* residents on what is known as United States survey No 435 of the Fairplay land district, Colorado, situate in California mining district, Lake county, Colorado.

Respectfully shows to your honors:

First. That himself and those for whom this petition and protest are filed are citizens of the United States, over the age of twenty-one years; that they are *bona fide* residents of the city of Leadville, Lake county, Colorado, and reside upon the ground embraced within
76 the boundaries of U. S. survey No. 435, for which said survey A. D. Searl has applied for a U. S. patent, claiming the same as a placer mining claim; that a partial list of the persons residing on said survey No. 435 is attached to and made a part of the affidavit of Enos S. Briggs filed herewith; that in the limited time which has been at the disposal of this protestant it has been impossible for him to obtain a full and complete list of the *bona fide* residents on said survey, but protestant is informed and verily believes that there are at least two hundred (200) such *bona fide* residents on said survey No. 435.

Second. That the land covered by said survey No. 435 lies in California mining district, Lake county, Colorado, and lies adjacent to and includes a portion of the city of Leadville, Lake county, Colorado.

Third. That such land was taken up and located in December,

A. D., 1877, by John Leahy *et al.* as a placer mining claim, as will be seen by reference to a certified copy of the location certificate of said claim filed herewith.

Fourth. That at the time of said pretended location and hitherto to this date the boundaries of said so-called placer claim were not and have not been marked and defined on the ground as the law requires.

Fifth. That on the 5th day of July, A. D., 1879, the applicant therein, A. D. Searl, filed in the United States land office at Leadville, Colorado, his application for a United States patent for said U. S. survey No. 435, claiming the same as a placer mining claim; said application being numbered 266, of the series of numbers
77 of said office; and that notice of said application was not posted on the ground during the time and in the manner required by the statutes of the United States.

Sixth. That neither the applicant, A. D. Searl, nor his grantors have expended upon the said survey No. 435 for placer mining purposes the sum of five hundred dollars.

Seventh. That the ground covered by said survey No. 435 is not properly placer mining ground, and has never been held and worked as such by the applicant or his grantors.

Eighth. That the said applicant A. D. Searl is not now and has not been, nor is or has any one been in the possession of said survey No. 435, or the land covered by said survey, as a placer mining claim.

Ninth. That said premises are almost entirely covered by mining survey of lode claims, and lie immediately adjacent to a well-defined system of lode mining claims, or lode deposits.

Tenth. That a large portion of the surface of the ground covered by said survey No. 435 is claimed and occupied by *bona fide* residents of the city of Leadville, who have erected thereon residences, stables and outbuildings, the aggregate value of which is not less than twenty five thousand dollars; the number and relative size and position of such residences, stables and out-buildings being correctly shown upon the plat herewith filed.

Eleventh. That the said applicant A. D. Searl has never intended, and does not intend, to work said premises as a placer mining claim; and in obtaining a patent for said premises his sole and only purpose is to speculate in said lands and distress the *bona fide* residents thereon, as said land is valuable for residence or municipal purposes only.

78 And in support of the allegations above set forth this protestant respectfully presents and shows to your honors the plat made by Charles J. Moore, a deputy U. S. mineral surveyor, and the affidavits of Charles J. Moore, J. W. Campbell, Marx Kahn, Simon Mooney and Enos S. Briggs, filed herewith and prayed to be made a part hereof.

Wherefore, your petitioner and protestant humbly prays;

That the application of said A. D. Searl for a United States patent on said survey No. 435 may be set aside and for naught held, and

that the said A. D. Searl may not be permitted to make entry of the land covered by said survey No. 435 as a placer mining claim.

(Signed) M. H. SEARS.

JOHN M. MAXWELL,
GEORGE S. PHELPS,
Solicitors for Protestant.

STATE OF COLORADO, }
County of Lake, } *ss:*

Mark H. Sears being duly sworn says: I have read the foregoing petition and protest and know the contents thereof, and the same is true of my own knowledge, except such matters as are therein stated upon information and belief, and as to those matters I verily believe the same to be true.

(Signed) M. H. SEARS.

Subscribed and sworn to before me this 13th day of December, A. D., 1882.

[SEAL.] (Signed) ABEL GOSS,
Notary Public.

79 Know all men by these presents, that we, the undersigned, have this 14th day of December, A. D., 1877, claimed by right of location under the laws of Congress and according to the local laws and regulations 157.02 acres of a placer claim situate in the California mining district, county of Lake, and State of Colorado, and described as follows, to wit:

Beginning at cor. No. 37 of survey No. 255: thence N. 2° E., 422.8 feet; thence N. 2° 35′ E., 440.5 feet; thence N. 10° 50′ E., 560.7 feet; thence N. 10° 37′ E., 845 feet; thence N. 32° 6′ E., 483 feet; thence N. 49° 13′ E., 155.5 feet; thence N. 78° 42′ E., 142 feet; thence S. 63° 38′ E., 260 feet; thence S. 77° E., 1841.4 feet; thence S. 12° W., 1420 feet; thence S. 13° W., 1420 feet; thence N. 77° E., 1841.4 feet; thence N. 75° 35′ W., 430.3 feet to the place of beginning, containing 157.02 acres of placer mining ground.

Variation on all courses 15° E.

JOHN LEAHEY.	ANDREW BALDRIDGE.
THOMAS STARR.	F. H. EDWARDS.
DAVID FULTON.	JOHN CURRIE.
GEORGE YOUNG.	J. B. HALL.

Recorded Dec. 24th, A. D., 1877, at 7 a. m., in Book 10, page 154.

STATE OF COLORADO, }
County of Lake, } *ss:*

I, J. W. Jacque, clerk and recorder in and for said county in the State aforesaid, do hereby certify that the *written* and foregoing is a true and correct copy of loc. cert. No. —, as appears of record in my office in Book E., page 261.

[SEAL.] Witness my hand and official seal this 13th day of Dec., A. D., 1882.

J. W. JACQUE,
Clerk and Recorder, Deputy.

80 In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. W. Searl upon His Application No. 266 on Survey No. 435 of the Fairplay Land District, Commonly Called the A. D. Searl Placer.

STATE OF COLORADO, } ss:
County of Lake, }

James W. Campbell, being first duly sworn, upon his oath deposes and says: I am a citizen of the United States, 29 years of age; I have resided in Leadville, Lake county, State of Colorado, for 2½ years; I know the so-called Searl placer mining claim, United States survey No. 435, situate in California mining district, Lake county, State of Colorado, and have resided on a portion of the same, during all the time that I have been in Leadville, with the exception of about one month; I have been superintendent of the Chrysolite mine, for the Chrysolite Mining Company, since the 15th day of December, A. D., 1880, and was timber foreman for said company prior to that time. Said Chrysolite mine, or rather the Chrysolite consolidation, embrace, among others, the Fairview, the All Right, Kit Carson, and Little Eva, cut out recently by amended placer survey of said Searl placer. I have had considerable experience in mining matters; I am thoroughly acquainted with the ground embraced in said so-called Searl placer since my residence thereon, and the ground embraced in said survey No. 435 lies adjacent to and includes a portion
81 of the east portion of the city of Leadville, Lake county, State aforesaid; and a number of the streets of said city are surveyed, laid out and dedicated to public use across said survey; the ground embraced in the plat (which I have been shown) representing the amended survey of said so-called Searl placer, is completely bounded on the east side thereof, and partially on the north side thereof, by lode claims, which are a part of a well known system of lode deposit. Some of said lodes are now yielding silver and lead bearing ores in paying quantities; said survey is near or in the vicinity of Big Evans gulch, which is the only natural water course or stream of water in the immediate neighborhood of said so-called placer claim; almost the entire body of water, from said Big Evans gulch, as this affiant has been informed and believes, is and has been appropriated by parties other than the placer claimant herein, so that it is impossible for said placer claimant to obtain any supply of water from that source for placer mining purposes; a ditch known as the "Starr ditch" runs across and along the western boundary

line of said survey No. 435, something less than 60 feet from said line; the water of said ditch is used by residents of Leadville for home purposes; and is also in placer mining work in California gulch, something near a mile from said survey No. 435.

The Arkansas river is the only source of water supply known to affiant, from which water could be brought on to the ground embraced in said so-called Searl placer in sufficient quantity to carry on placer mining; and the cost of bringing the same by ditch
82 and flume would be very large; the distance to the nearest point being something over eight miles.

In my opinion the cost of bringing water from that point would not be less than fifty thousand dollars; during the time I have resided in Leadville I have been over all the ground covered by said amended survey No. 435, and I have been over portions of it every day since I have resided in Leadville.

The general character of the ground embraced in said survey I should designate as a glacial deposit and wash; no timber remains upon the ground; though the stumps yet to be seen indicate that it was formerly covered with a growth of pine or spruce; there are within the boundary line of said survey perhaps two holes, which I should say were sunk for the purpose of prospecting the ground; they vary in depth from four to fifteen feet. I do not think that from these holes any determination whatever could be arrived at as to the value of said ground as placer ground, and none such bedrocks; there are several shafts embraced within or included within the boundaries of said amended survey.

These shafts were sunk by the owners of various lode claims located upon the ground covered by said amended survey, several of these shafts are used as wells. Besides the holes above mentioned there is a small ditch, less than 300—feet in length, it varies in depth from 8 to 16 inches.

This ditch is partially filled up by wash; it begins at the Stow ditch, and this ditch, such as it is, would not afford water sufficient for placer mining purposes, or any portion of said ground. I know of no placer improvements upon said ground, unless the prospect holes and ditch above referred to are claimed as such, and if
83 so claimed, I am satisfied from my experience and knowledge of such work, that the value of such work and improvements could not possibly exceed three hundred and fifty dollars.

I have never seen during my time of residence on a portion of said survey No. 435 any evidence whatever that the placer claimant herein, or any one for him, was in possession of said ground for placer mining purposes; and although I have been careful to note what has been done on said ground during the time I have resided thereon, I have never seen the placer claimant herein, or anyone for him, doing any placer work thereon, or working the same for placer purposes. The occupants of said ground are residents thereon, and there are upon the ground included in said amended survey some 300 residences and stables, all of which are a part of the city of Leadville, a large proportion of said buildings are pri-

vate residences, mainly frame and log buildings, and the rest are stables, except a large dairy barn.

In my opinion the ground included in said amended survey cannot be worked as placer ground by any known system of working said placer ground, as there are no discovered leads, lodes or ledges bearing gold on any lands or streams adjacent to said survey; and in my judgment gold in paying quantities does not exist in any of the ground covered by said amended survey No. 435; and it is my opinion from my knowledge of said ground, and the examinations I have made, that the ground included within the boundaries of said survey No. 435, is really valuable only for municipal
84 purposes, and for seats for towns and for residences.

(Signed) J. W. CAMPBELL.

Subscribed and sworn to before me this 13th day of December, A. D., 1882.

[SEAL.] T. L. BYRNE,
Notary Public.

In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. D. Searl upon His Application No. 266 on Survey No. 435 of the Fairplay Land District, Commonly Called the "A. D. Searl Placer."

STATE OF COLORADO, }
County of Lake, } *ss:*

Charles J. Moore, being duly sworn, upon his oath says: I am a citizen of the United States, 34 years of age; I have been a deputy United States mineral surveyor nearly four years, and during that time I have resided and practiced my profession in Leadville, Lake county, Colorado; and in connection with the prac-
85 tice of my profession I have had a large experience in examining and reporting on placer mining claims; I know the so-called Searl placer mining claim, United States survey, No. 435, situate in California mining district, Lake county, State of Colorado; I have known the ground embraced in said so-called Searl placer and survey since the spring of 1879. The ground embraced in said United States survey No. 435 lies adjacent to and includes a portion of the northeast portion of the city of Leadville, Lake county, Colorado, a number of the streets of said city having been surveyed, laid out and dedicated to public use across said survey No. 435. The ground embraced in the plat representing the amended survey of said so-called Searl placer, is completely bounded on the east side thereof, and partly on the north side thereof, by lode claims; and belonging to a well-known system of lode deposit and individual lodes. Some of said lodes are now producing silver and lead-bearing ores in large and paying quantities; said survey No. 435 is in

the vicinity of, but not on the immediate bottom, Big Evans gulch, which is the nearest natural water course or stream of water; no portion of the northern boundary line of said survey No. 435 is immediately adjacent to or comes to the bottom of said gulch; the northern boundary line thereof being on the second bench or bottom above said gulch. Almost the entire body of water of said Big Evans gulch is, and for a long time has been, appropriated by prior water claimants, so that no water whatever from that source could be obtained for placer mining purposes by the applicant in this case.

A ditch known as "the Starr ditch" runs along the western
86 boundary line of said survey No. 435, at a distance of from 20 to 50 feet from said boundary line, and on a lower level than said survey No. 435. The water in that ditch is used by the residents of the city of Leadville for domestic purposes, and for placer mining operations carried on in California gulch at least one mile distant from said survey No. 435 at its nearest point thereto.

The nearest point on the Arkansas river (which is the only other source of water supply) from which water could be brought to and upon said survey No. 435 in quantities sufficient to carry on placer mining operations on the same, is nine miles; and the cost of constructing a ditch, which would conduct sufficient water on said survey No. 435 for such purposes, would be not less than thirty-five thousand dollars.

The plat marked "Searl placer," filed with the protest in this case, and made a part thereof, certified by me, was made from actual surveys on the ground, which surveys were made between the 13th day of November, A. D., 1882, and the 5th day of December, A. D., 1882, by myself and two assistants. In making such surveys I thoroughly and carefully examined every part and portion of said ground covered by the amended survey No. 435; the general character of the ground covered by said survey is a glacial deposit and wash. There is no timber whatever on the ground; from the number of stumps remaining upon the ground it is evident that it was once covered with a thick growth of pine or spruce. There are within the boundaries of said survey No. 435 about one dozen holes varying in depth from 3 to 8½ feet, which I was informed were sunk by the placer claimant for the purpose of prospecting
87 such ground; none of these holes are of any value whatever to determine the economic value of said ground as placer ground, as none of them reach bed-rock. There are also within the boundaries of the amended survey seventeen shafts, varying in depth from three to three hundred and sixty feet—six by three feet in the clear, nearly all of which are well timbered. These shafts were sunk by the owners of various lode claims, located upon the ground covered by said amended survey; none of them were sunk by the placer claimant, or his grantors; seven of these last mentioned shafts are used as wells for domestic purposes.

The only geological formation shown by the development in these deep shafts, other than the glacial wash and drift already mentioned, is porphyry rock in place, which porphyry is certainly not the bed-

rock; none of these deep shafts having reached the bed-rock. The surface wash varies in depth but appears to be an average of 35 to 50 feet in depth as shown by a comparison of the different shafts mentioned above.

Other than the holes above mentioned, there is a short section of ditch claimed to have been dug by the placer claimant; the mean depth of this ditch is 18 inches to 2 feet, width of this ditch 3 feet; the total length of this ditch is 236 feet. This ditch is filled up by wash in three places, aggregating a length of about 80 feet, which is so filled up. The mouth of this ditch is at the Starr ditch about the middle of the block between Hazel and Alder streets on the north side of 14th street, as shown on the plat herewith filed. There is no such ditch on the ground as shown on the amended plat,
88 thorough search having been made therefor. The ditch as it actually exists on the ground would not afford sufficient water for working any portion of the ground included within the boundaries of the amended survey as placer grounds; with the exception of the prospect holes, and the section of ditch above described, there are no placer improvements or improvements for placer mining purposes whatever, included within the boundaries of the amended survey, and four hundred dollars will certainly cover all the work done or improvements made for placer mining purposes by the placer claimant.

The plat filed herewith shows a small ditch carrying water pumped from the ruins on Fryer hill, to brick-yards below the Starr ditch, and is there used for making brick; this ditch, however, is not claimed by the placer claimant as forming any part of the improvements for placer mining purposes.

There existed at the time of making the surveys for the plat no evidences whatever to show that the placer claimant herein, or any one for him, was in possession of said ground for placer mining purposes. The sole occupants of said ground are the *bona fide* residents thereon, and there are upon the ground included in said amended survey 312 residences and stables, and not including shaft houses, all of which are a portion of the city of Leadville.

The great majority of above buildings are private residences, mainly frame and log buildings; the rest of the buildings are stables with one exception—a dairy barn of large dimensions. The relative sizes and positions are correctly shown upon the plat filed herewith.

89 In my judgment the ground included within the boundaries of the amended survey No. 435, cannot possibly be worked or mined as placer ground by any known system of working placer ground. No gold-bearing leads, lodes or ledges have been discovered on any lands adjacent to, or any streams flowing near or adjacent to, said survey No. 435, so that it is very highly improbable that gold in paying quantities or in any quantity whatever exists upon or in the ground covered by said survey No. 435; and it is my opinion from my knowledge of said ground, and the examination I have made of the same, that the ground included within the

boundaries of said survey No. 435, is valuable only for municipal purposes, and for seats for towns and for residences; and further this affiant says that he is not interested in the application for patent upon survey No. 435, nor in this protest in any manner whatsoever.

(Signed) CHARLES J. MOORE.

Subscribed and sworn to before me this 14th day of December, A. D., 1892.

[SEAL.] (Signed) T. L. BYRNE,
Notary Public.

90 In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. D. Searl upon His Application No. 266 on Survey No. 435 of the Fairplay Land District, Colorado, Commonly Called the A. D. Searl Placer.

STATE OF COLORADO, }
County of Lake, } ss:

Enos S. Briggs, being duly sworn, upon his oath says: I am a citizen of the United States, thirty-two years of age; I am a miner and have been engaged as such for five years last past; I am, and have been for the past two years, a resident of Leadville, Lake county, Colorado; and for two years last past have known the ground covered by U. S. survey No. 435, known as the A. D. Searl placer claim, situate in California mining district, Lake county, Colorado: said ground lies adjacent to and forms a part of the northeast portion of the city of Leadville, the streets of said city of Leadville running upon and across a portion of said ground. I have frequently within the past two years been over said ground, and on the 11th day of December, A. D. 1882, I made a thorough and careful examination of every portion of the ground included within the boundaries of said survey No. 435. The paper attached to this affidavit marked "Exhibit A" is a full and correct list and statement of all the improvements and work done upon said
91 ground. The ditch mentioned on said list, and fifteen holes from three to ten feet deep, are the only improvements, if they can be called such, which have been placed upon said ground by the applicant herein; and the total cost of excavating said ditch and sinking said fifteen holes would not exceed two hundred dollars ($200.00)

The ditch above mentioned is entirely worthless for placer mining purposes, as it is filled up for about ninety feet of its length, and from its position—if it was in good order—it could not convey water upon any considerable portion of said ground. The holes mentioned in said list are of no value for placer mining purposes, as none of them reach bed-rock. The shafts mentioned on said list were sunk by the locators and claimants of lode mining claims, which have been abandoned, none of said shafts reach bed-rock,

and but one of them has reached solid foundation at a depth of more than two hundred feet. The foundation of the said ground, as shown by the various dumps at or near the shafts above mentioned, is a boulder wash, and appears to be from one hundred to two hundred feet deep. There is no water, except a small quantity of surface water, upon said claim; and the nearest point from which water could be brought upon said ground, in quantity sufficient to carry on placer mining operations, is the Arkansas river, at a point at least ten miles from said ground.

There is no timber on said ground. No placer mining operations whatever have been carried on upon said ground within the last two years, neither is the applicant or any one for him in possession of said ground for placer mining purposes. From my knowledge of the ground, and examination of it, I am of the opinion that
92 said ground is valuable only for municipal or residence purposes; and there are now upon said ground in the neighborhood of two hundred *bona fide* residents upon said ground, a partial list of whom is hereto attached marked "Exhibit B;" and there are within the boundaries of said survey No. 435 in the neighborhood of three hundred buildings, the residences and stables of said *bona fide* residents.

(Signed) ENOS S. BRIGGS.

Subscribed and sworn to before me this 14th day of December, A. D., 1882.

[SEAL.] (Signed) T. L. BYRNE,
Notary Public.

"EXHIBIT A."

Ditch about 240 ft. long, from 1 to 1½ ft. deep, and 2 to 2½ ft. wide, its end 75 to 80 ft. from Starr ditch, filled up from 75 to 90 ft.

Holes and shafts.

1	S.	side of	R. R. track	4	ft. deep—	15th	St.
2	"	"	"	5	"	15	"
3	N.	"	"	5	"	16	"
4	"	"	"	4	"	16	"
5	S.	"	"	6	"	16	"
6	"	"	"	10	"	16	"
7	"	"	"	10	"	16	"
8	N.	"	"	10	"	16	"
9	N.	"	"	10	"	16	"

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10	N.	side of	R. R. track	30	ft. timbered—	16th	St.
11	S.	"	"	40	" timb'd., caved in,	16th	St.
12	S.	"	"	10	"	16th	St.
13	S.	"	"	20	" "	16	"
14	S.	"	"	100 to 200 ft. timb'd., known as "Oregon			

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Boy;" perhaps this wash, iron stain, porphyry and blue print sunk for lode purposes.

15 S. side of R. R. track 40 ft. timb'd.
16 S. " " 3 "
17 S. " " 25 " timb'd.
18 S. " " 45 " "
19 S. " " 38 " "
20 S. " " 45 " " —Zulu lode.
21 S. " " 5 " bet. 12 & 13 St.
22 S. " " 5 " " " "
23 S. " " 5 " " 11 & 12 St.

24 S. side R. R. track shaft timb'd., 55 ft. deep, now used as a well, bet. 11 & 12, head of Orange St.

25 S. side of R. R. track 50 ft. deep timb'd., bet. Alder & Orange on 11th.

26 "Kelly Bros. lode," shaft 112 ft. timb'd. shaft house.

B. & S. 27 (1) Shaft near road turning toward smelter 20 ft. deep, timb'd. on Tamson lode. Shaft 35 E. of (1) 75 ft. deep timb'd. on Tamson lode.

Tamson Lode shaft proper (could'd. measure cov'd. by shaft-house locked up)

Shaft 30 ft. S. of shaft-house 6 ft. deep on Tamson L. Shaft 94 25 ft. south of shaft-house 30 ft. deep, timb'd.

28 Shaft on 12th St., 50 ft. deep, timb'd.
29 " " 9th St., 85 ft. " "
30 " " " " 40 ft. " "
31 " " " " 35 ft. " "
32 " " " " 60 ft. " " now used as a well.

"EXHIBIT B."

Names of Parties Living on "Searl Placer."

Eighth street.

1 William Wetherell,
2 John Gregory,
3 Henry Moore,
4 W. S. Neal,
5 Mrs. McCloud,
6 Moses Coll,
7 Joseph Normington,
8 Charles Byers.

Ninth street.

9 Rob't Sculley,
10 P. Doyle,
11 John Andres,
12 Mrs. Claugherty,
13 James Seigfried,

95
14 Geo. Klock,
15 Thos. Simpson,
16 J. A. Hebbard,
17 William Henchliff,
18 L. C. Scott,
19 George Mussellmann,
20 Charles Reiger,
21 Fred Cadwell,
22 Asia Crow,
23 Frank Elliot,
24 William Weir,
25 William Davis,
26 James Uren,
27 Enos S. Briggs,
28 A. W. Duggan,
29 Howard Chapan,
30 Charles Mayham,
31 J. A. Green,
32 C. Z. Green,
33 G. O. Worrell,
34 John Daum.

Tenth street.

35 J. E. Gallagher,
36 C. Fields,
37 C. H. Jones,
38 S. L. Randall,
39 Wells Brown,
96
40 P. Neal,
41 C. Streb,
42 Walter Donehue,
43 A. F. Abbott,
44 Mrs. Dimick,
45 Henry Girkin,
46 John Lynch,
47 Mrs. Sheriff,
48 W. C. Parker,
49 W. C. Teft,
50 B. B. Gransberry,
51 Harry Berry,
52 H. C. Francis,
53 M. H. Sears,
54 Alfred Seabrook,
55 Joseph Brokenshire,
56 Thomas Cully,
57 W. E. Moses,
58 E. Mooney,
59 Thos. Gleason,
60 A. L. Ellis,
61 Mark Drummand

105 Mr. Fritz,
106 Marx Kahn,
107 Messrs. Kelly Bros.
108 Havens & Beman,
109 J. W. Christy,
110 Mrs. Hutchinson—9th
111 C. C. Rulinson—9th
112 Frank Marton

62 L. P. Hanson,
63 M. Crissman,
64 E. E. Tinsdale,
65 J. H. Roberts,
97 66 Able Goss,
67 Olef Nellson,
68 H. C. Dimick,
69 J. W. Campbell,
70 J. H. Hinby,
71 John Moore,—11th St.
72 John Brado,
73 William Lewis,
74 E. J. White,
75 M. Labell,
76 A. A. Anson,
77 J. R. Kinzy,
78 John Freshbrook,
79 C. Metcalf,
80 Alfred Meginity.
81 Henry Rider,
82 Geo. Robinson,
83 E. Cadwell,
84 John Otter,
85 D. W. Davis,
86 William Booco,
87 Samuel Burnsides,
88 John G. Howard,
89 M. A. Bunker,

98 Twelfth street.

90 James Scanlan,
91 David Noble,
92 John Vasser,
93 James Hensley,
94 Sylas Brown,
95 Mrs. Thomas,
96 S. F. Earl,
97 Thomas Trent,
98 Edward Stanton,
99 Mrs. Hanna,
100 B. F. Warfield,
101 Thomas Guddick,
102 Newton Graham,
103 Joseph Kretchler,
104 J. H. Clute,

Renters—Eighth street.

Mrs. F. L. Cole,
Edw'd Bennett,
James Quinn,
C. A. Underwood,

Ninth street.

Thos. Tait,
John Marfeil,
H. C. Corwin,

99 Eleventh street.

James Kavanaugh,
John McDonald,
W. W. Dickey,
F. C. Miller,
Isaac Walton,
G. S. Davis,
Frank Henskell,
W. H. Lovell,
Geo. Wirth.

100 In the United States Land Office at Leadville, Colorado.

In the Matter of the Protest of MARK H. SEARS and Others against the Issuance of a Patent to A. D. Searl upon His Application No. 266 on Survey No. 435 of the Fairplay Land District, Commonly Called the "A. D. Searl Placer."

STATE OF COLORADO, } ss:
County of Lake, }

Simon Mooney, being duly sworn, upon his oath says: I am a citizen of the United States, forty-four years of age; I am now and for three years last past I have been a resident of Leadville, Lake county, Colorado, and during that time I have known the ground covered by what is known as the "Searl placer," it being U. S. survey No. 435, situate in California mining district, Lake county, Colorado; said Searl placer lies adjacent to and forms a part of the northeast portion of the city of Leadville, and adjoins Freyer hill on the west. I have been over the ground covered by said placer a
101 number of times, and am well acquainted with the location and character of the ground included within the boundaries of said Searl placer.

On the 11th day of December, A. D., 1882, I made a careful and thorough examination of said ground for the purpose of determining the character and extent of the work which had been done, and the improvements made upon said ground by the applicant for patent herein, and any other person or persons. Upon such examination I found fifteen holes from three feet to ten feet deep in the wash, none of which are timbered and none of which are of any value whatever for placer mining purposes. I also found twenty-one shafts varying in depth from twenty to over two hundred feet deep; most of which are timbered, and judging from appearances these shafts were sunk by the owners and claimants of lode mining claims which have been abandoned. None of these shafts have reached

the bed-rock as shown by the dumps at the shafts. Upon this examination I also found a ditch taken from the Starr ditch, which runs near the western boundary of said placer claim; this ditch is about two hundred and forty feet long from twelve to eighteen inches deep, and from twenty-four to thirty inches wide, and is completely closed up for about seventy-five feet of its length; and is of no value whatever for placer mining purposes. The cost of constructing this ditch could not exceed fifty dollars and the cost of sinking the fifteen holes above mentioned could not exceed two hundred dollars ($200.00).

There is no water whatever except surface water upon the claims, and the only source of supply from which water could be
102 obtained in sufficient quantity to carry on placer mining operations upon said ground is the Arkansas river at a point at least ten miles distant; and the cost of constructing a ditch from such point with a capacity sufficient to conduct water upon said ground for placer mining purposes would be very great. Since I have known the ground within the boundaries of said Searl placer there have been no placer mining operations whatever conducted or carried on upon said ground by the applicant for patent herein or by any one else.

From my knowledge of the ground and from the examination of it, which I have made, I am of the opinion that said ground is not valuable for placer mining purposes, and is only valuable for municipal purposes; there being at the present time not less than —— *bona fide* residents upon said ground, many of whom have resided there for the past four years.

(Signed) SIMON MOONEY.

Subscribed and sworn to before me this 12th day of December, A. D. 1882.

[SEAL.] (Signed) T. L. BYRNE,
Notary Public.

STATE OF COLORADO, }
County of Lake, } *ss:*

Marx Kahn, being duly sworn, upon his oath says: I am a citizen of the United States, fifty-two years of age; I am, and
103 for nearly three years last past have been, a resident of Leadville, Lake county, Colorado; and for two and one-half years last past I have known the ground embraced within the boundaries of U. S. survey No. 435, commonly known as the Searl placer claim. I have frequently been over said ground, and on the 11th day of December, A. D., 1882, I, in company with Simon Mooney and others, made a thorough and careful examination of said ground; I have heard read the foregoing affidavit of said Simon Mooney and know the contents thereof, and each and every statement therein contained is true of my own knowledge, so far as such statements relate to said "Searl placer claims."

(Signed) MARX KAHN.

Subscribed and sworn to before me this 14th day of December, A. D., 1882.

[SEAL.] (Signed) T. L. BYRNE,
Notary Public.

104 P. DEPARTMENT OF THE INTERIOR, A. Y.
1884–88345. GENERAL LAND OFFICE, J. W. L.
WASHINGTON, D. C., *March 6th*, 1886. B. B. S.

Register and receiver, Leadville, Colo.

GENTLEMEN: I have this day considered the testimony taken at a hearing before you involving A. D. Searl's application for the Searl placer, survey No. 435.

The original application for patent was filed July 5, 1878 for 152.02 acres of land based on a location made Dec. 14, 1877, by Thomas Starr and seven other parties. Notice thereof was given by publication and posting from July 19, to Sept. 13, 1879. During the period of publication a large number of adverse claims were filed by lode claimants and suits were afterwards instituted thereon in accordance with the requirements of the statute.

The county judge of Lake county having previously applied on behalf of the inhabitants of "North Leadville" to enter the land as a townsite, a hearing was ordered to determine the character of the land as well as the priority of right as between Searl *et al.* and the townsite claimants. On the testimony taken at the hearing this office decided in favor of Searl, and the case having been appealed, the Secretary of the Interior, under date of April 17, 1880 (Copp's L. O. vol. 7, p. 36) affirmed the decision, holding that the
105 surveyor general's return as to the mineral character of the land was not overcome by the proof and that the tract should be held to be mineral. The townsite application was thereupon dismissed.

On April 5, 1881, E. O. Lowe filed an application for the Zulu lode, alleged to be within the limits of the Searl placer claim. By office letter dated May 31, 1881, the application was rejected but a hearing was ordered for the purpose of ascertaining whether or not there was a Zulu lode within the Searl placer. An appeal from this decision was filed. The hearing however was proceeded with and the testimony taken thereat was transmitted to this office. Applications for patents for other lode claims within the placer were filed. November 10, 1882, Searl filed an amended application for patent by which the claim was reduced in size to $101\frac{916}{1000}$ acres and all of the alleged lode claims, excluded except the Zulu and Lucy B. Hussey. The suits on all of the adverse claims were then dismissed.

Under the date of Dec. 14, 1882 Special Agent Robert Berry reported that he had investigated the Searl placer claim and found that there were no placer improvements thereon except the Oro Mining and Fluming Company's ditch, which was built years before this claim was located; that the other improvements thereon were

for townsite purposes and that the land was rapidly being built upon as the city of Leadville increased in size. He reported further that the land was supposed to contain lodes or ledges or carbonate mineral, and that the placer claim was clearly fraudulent.

106 Dec. 16, 1882, M. H. Sears on behalf of himself and two hundred other residents of Leadville filed a protest against the Searl application, alleging among other things that Searl and his grantors had not expended five hundred dollars on the claim; that it was not placer mining ground; that it was almost entirely covered by lode locations and was immediately adjacent to a well defined system of lodes, and that Searl never intended to work the premises as a placer claim. The papers in the case of Searl *v.* The Zulu Lode Claim and certain protests, as well as agent Berry's report were transmitted to the Secretary of the Interior on the 2nd and 20th of Dec. 1882. The Secretary in his decision dated Dec. 27, 1882, directed in view of all the facts and circumstances in the case raising a doubt as to whether the land was more valuable for placer mining than for other purposes, that a hearing be ordered to ascertain the character of the land and the status of all existing claims and interests, and suspended all prior orders and proceedings. The hearing was accordingly ordered and July 30, 1883, was fixed by the register and receiver for that purpose. On that day Messrs. Maxwell and Phelps appeared as attorneys for M. H. Sears and his associates and F. W. Owers for Searl. The case was adjourned to Aug. 14, 1883, when the attorneys for Sears *et al.*, withdrew the appearance of their clients. Objection at the same time was made by Searl to the notice, whereupon new notice was issued and the hearing set for Sep. 20, but was not proceeded with until November 15, 1883 at which time D. E. Parks and Special Agent Berry appeared for the Government and Owers for claimant. Webdzell appeared for Sears and four other

107 protestants for the purpose of moving a continuance upon the ground that they had not been served with proper notice of the hearing. You overruled the motion and attorneys for Sears and for claimant excepted. The claimant could not be injured by a defective notice to his opponents and his objections should not have been entertained; nor could the protestants demand the notice as a matter of right as they were not parties in interest; but if it were otherwise, their objection ought not to have been sustained under the circumstances of this case. They were advised of the hearing and appeared by attorney on the day fixed for that purpose and thereby waived all objections to the insufficiency of the notice. It also appears from the testimony taken at the hearing that Sears and those acting with him had entered into some kind of a compromise with Searl by which they were to desist from any further attempt to defeat the placer application. Claimant also objected to the notice upon the grounds that it did not contain the names of the protestants; that it was not served on certain of them who were non-residents of the State and that it did not give the precise ques-

tion of fact to which the investigation was addressed. The objections were properly overruled as claimant was advised of the points in issue; and as he appeared and produced his testimony at the trial and cross-examined the Government witnesses he — estopped from pleading the insufficiency of the notice. The hearing was proceeded with and a large amount of testimony taken both on the part of the Government and the claimants, fifteen witnesses being introduced by the Government and twelve by
108 claimant. The testimony relates principally to the character of the land; its value for placer and lode mining and for townsite purposes and as to the character and value of the improvements thereon. The witnesses for the Government all of whom are practical placer miners, except two, testify that they had thoroughly prospected on the various shafts and prospect holes, which had been sunk in different parts of the claim, for placer mineral, but found none; that the character of the formation did not indicate the presence of such mineral and the claim had no value for placer mining; that there were a great many dwellings and other houses thereon, and that a large portion of the claim was used for townsite purposes, that being its principal value; that it adjoins the city of Leadville and is occupied by three or four hundred persons, some of whom commenced to build thereon in 1878 or 1879. The witnesses W. A. Davis prospected the ground in 1866, and again in 1883 but found no mineral.

Abraham Lee spent two days prospecting it in 1879 and got light color of gold, but not of such a character or such quantity as to indicate placer mineral of any value.

It appears from the evidence submitted by the Government that no placer improvements were ever placed on the claim by Searl or his grantors; that there were a large number of shafts and prospect holes sunk, most if not all of them by parties prospecting for lodes, and that water could not be brought on to the claim for placer mining without great expense.

The witnesses for claimant, John S. Anderson, A. H. Mallory
109 and Charles G. Arnold found mineral on the land and T. G. Johnson found color, and some of the other witnesses gave their opinion that the ground was mineral without, however, ever having prospected it. Sanderson was the locator of the Ingersoll lode claim which lies within the limits of the Searl location and the alleged discovery of mineral by him was found in the discovery shaft of this claim. The shaft was sunk with a view of discovering mineral in place and not placer and the claim was located and treated by him as a lode claim, but afterwards sold to Searl. He admits that mineral in paying quantities has not to his knowledge been discovered and states that his opinion as to the mineral character of the land is based on the surroundings. His opinions as to the relative value of the land for mineral and townsite purposes are extravagant and not well considered. He states that the tract has little or no value as a townsite, although it adjoins Leadville, and has a large number of dwellings thereon, which are and have been

for years occupied by residents of Leadville. He estimates the value of the land for placer mining at two hundred thousand dollars, while he admits that mineral in paying quantity has never been discovered although thoroughly prospected.

Mallory was an employee of Searl. The mineral or color referred to by him was alleged to have been discovered in 1879. He says the claim may be found to be very valuable for mineral when the bed-rock is reached or it may not. He claims that the assessment work for 1880 was done under his directions consisting of eight ten foot holes. He also says that some work was done in 1881
110 and 1882. This witness was interested with Searl in some of his business transactions.

Arnold's examination of the ground was superficial and he did not discover mineral in paying quantities. Johnson found nothing but color. He had been in the employ of Searl.

Andrews claims to have — the assessment work for 1881. Searl and Hall thinks the land is placer ground but neither of them ever prospected it. Searl is the applicant and Hall was one of the original locators and now owns one-eighth of the claim. The witness Jas. Powell did not prospect the land and based his judgment on the character of the adjoining claims. The other witnesses state no fact from which it could be inferred that the claim contains placer mineral. Their statements are confined principally to the value of the ground for townsite and other purposes; they holding that it is chiefly valuable for placer mining and has little or no value for townsite purposes. By agreement of parties testimony taken at the hearing in July 1881 in the cause of The Owners of the Zulu Lode *v.* The Searl Placer, upon the question as to whether there exists a Zulu lode within the Searl placer was to be considered and treated as testimony in this case.

Eight witnesses testify on behalf of the Zulu claimants as to the formation found in the Zulu discovery shaft and that it was lode ground.

The witnesses Hebschle, Schlophohl & Dieneff claim to have found mineral in rock in place in the nature of iron carrying
111 silver and the others expressed the opinion from what was found in the dump and from the character of the adjacent claims which contain similar formation to this, that mineral in place exists.

The seven witnesses for Searl, a number of whom examined the Zulu shaft state that no lode was ever discovered.

Gildersleeve and Houghton testify that no placer mining or placer work was ever done on the Searl placer.

Mallory's testimony is substantially the same as that given by him at the subsequent hearing and referred to above.

You decided that patent should not be issued for the Searl placer. 1st. Because the improvements thereon were not sufficient, nor of the character required by law, and, 2d, because the evidence did not satisfactorily show that the claim was more valuable for placer mining than for other purposes. From this decision Searl appealed.

His counsel contend in their argument that the question as to the character of the land is *res adjudicata* by former trial and final decision thereon and that the testimony submitted affirms the correctness of the former conclusion.

The trial and decision referred to were in the case of North Leadville *vs.* Searl, above mentioned.

One of the essential principles necessary to constitute a matter *res adjudicata* is the identity of the parties. The parties to the present hearing were not parties to the former trial. Independent of this however the objection to the hearing upon the ground mentioned is not well taken. The matter as to the character of the land
112 is not finally adjudicated until the title passes from the Government. It could not be otherwise, from the very nature of the duties and responsibilities of the officers of the Land Department. The issuance of patents for mineral lands under the agricultural laws is unauthorized and inhibited, as well as the issuance of patents under the mineral laws, where mineral has not been discovered; so that the responsibility of determining the question as to the character of the land correctly rests with this office up to the date of the issuance of the patent. It is not a matter simply between adverse claimants, which may be settled by their consent, but it is one which must be decided from the best evidence attainable from all legitimate sources, and so long as the subject matter is under the control of the Land Department no number of trials and decisions will estop further inquiries and investigations to assure a satisfactory conclusion. The character of the land has therefore not been finally determined and it must be decided upon the testimony taken at the hearing. After carefully considering the same I am satisfied that the land is not placer mineral ground. To authorize a placer patent, mineral in paying quantities should first be discovered, or the character of the information be shown to be such as to indicate with reasonable certainty that mineral exists in such quantities and of such a quality as will pay to work it either at the present or at some future time. The tract must be shown to have a real value at date of entry for the mineral therein. The land has been thoroughly prospected for a great many years and nothing more has been discovered than might be found any where in the vicinity of Leadville.

No mineral of consequence has been shown by the proof to
113 have been discovered and no placer mining or work has been done.

I am not satisfied that the requisite expenditure has been made and the character of what was made is not such as is contemplated by the law, it not being for the improvement of the claim for placer mining, or for the discovery of placer mineral. While the proof does not, in my opinion, show the discovery of a lode within the placer survey, it does not indicate the probable existence of mineral in rock in place. I am satisfied from all the evidence that claimant has not acted in good faith, and that he is attempting to acquire title to the land on account of its value for townsite purposes and for the lodes supposed to be contained therein.

The application is accordingly rejected subject to appeal within 60 days. So notify the parties.

Very respectfully, S. M. STOCKSLAGER,
Ass't Commissioner.

114 Vol. 6–908. DEPARTMENT OF THE INTERIOR, F. L. C.
WASHINGTON, R. B.
November 13, 1890. J. B. McN.

Searl placer. *Mineral Application.*

The Commissioner of the General Land Office.

SIR: This is an appeal by A. D. Searl from your office decision of March 6, 1886, rejecting his application to make mineral entry for the Searl placer claim amended survey No. 435, Leadville, Colorado.

His original application was filed July 5, 1879 and 150.02 acres. By the pending application filed March 10, 1882, his claim was reduced to 101.918 acres thereby excluding certain conflicting lode claims.

It appears from the statements of your office that prior to the original application the county judge having applied on behalf of the inhabitants of North Leadville to enter the land as a townsite, a hearing was ordered to determine its character and the priority of right, that upon the evidence adduced your office decided in favor of Searl, and that on appeal, this department on April 17, 1880, (7 C. L. O., 36,) affirmed that decision and held that the surveyor general's return as to the mineral character of the land had not been overcome. The townsite application was accordingly dismissed.

115 Subsequently on the report of a special agent of your office and the representations of certain residents of Leadville, alleging among other things that the ground was not placer, the department December 27, 1882, finding "a great doubt whether or not the ground claimed is more valuable for placer mining than for other purposes" ordered a hearing to ascertain the character of the land and the status of all existing claims and interests and suspended all prior orders and proceedings.

Upon the evidence adduced at the hearing had (November, 1883), in pursuance of the above order the local officers found that the land was not distinctively valuable for placer mining and that the same had not been improved as required by law and recommended the rejection of the pending application.

On Searl's appeal from this ruling the same was affirmed by your said office decision of March 6, 1886.

In his appeal here he alleges that the question as to the character of the land became *res adjudicata* by reason of the action of the department (7 C. L. O., 36, *supra*) upon the former hearing.

This contention is disposed of adversely to him by the departmental decision in the case of The Central Pacific R. R. Co. *v.* Valentine (11 L. D., 238), wherein it was held (p. 246), that the Land Department had jurisdiction to ascertain and determine what lands

were subject to the railroad grant (from which mineral land was expressly excepted) and that such jurisdiction continues "until the lands have been either patented or certified to, or for the use of, the railroad company."

116 The matters touching the merits of the case are sufficiently stated by your office in the decision appealed from and reference is had thereto.

It will therefore be quite unnecessary for me to comment in detail, upon the voluminous testimony submitted in this case.

It is the rule of the department that the "first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands," which are sought to be acquired as such. (Sec. 1 Circular *cicular* September 22, 1882, *I.* L. D. 685)

The testimony produced at the hearing had before the local officers in November, 1883, although conflicting in its character, I think by a fair preponderance, establishes the fact that continued prospecting for several years failed to disclose in any appreciable quantity, the presence of valuable placer mineral in the claim or to establish as a "present fact" within the meaning of section 2329, R. S. the "placer" character of the land. Peirano *et al. v.* Pendola, 10 L. D., 536. It further appears that while the appellant has constructed some ditches on the tract, he has brought no water thereon and that the work on the claim consisted mainly in making a considerable number of shafts with the view to the discovery of "lodes" and not for the purpose of "placer" development.

The testimony was taken before the register and receiver, who saw and heard the witnesses on the stand, observed their demeanor and could judge therefrom who is most worthy of credit.

117 Their joint opinion is accordingly entitled to special consideration. Kelley *v.* Halvorson (6 L. D., 225); Morfey *v.* Barrows (4 L. D., 135.)

In accordance therefore with the views heretofore expressed, I must find that no sufficient warrant is shown for disturbing the concurring decision of the local and your office, which under like circumstances are generally accepted by this department as conclusive. Chichester *v.* Allen (9 L. D., 302); Conley *v.* Price (*id.*, 490), Cleveland *v.* North, 11 L. D., 344.

The judgment of your office is affirmed.

The record transmitted is returned herewith.

Very respectfully, GEO. CHANDLER,
Acting Secretary.

118 Thereupon the plaintiffs stated that if the proceedings before the Commissioner were to be allowed in evidence, that the letter from the Secretary of the Interior to the Commissioner of the General Land Office, as reported in 22 Land Decisions, page 527, should be read in connection therewith; to which counsel for defendant objected as immaterial, irrelevant and incompetent, which

said objection was overruled, to which ruling counsel for defendant then and there excepted.

Said letter was thereupon read in evidence and is in words and figures as follows:

Secretary Smith to the Commissioner of the General Land Office, May 13, 1896. (P. J. C.)

The record before me shows that the Clipper Mining Company on August 31, 1893, made application for patent for the Capitol, Clipper, Congress, and Castle Lode claims, lot No. 6965, Leadville, Colorado land district, and that during the period of publication adverse claims were filed, among them one by A. D. Searl, *et al.*, alleging conflict with the Searl placer claim. Suits were instituted, but all were dismissed except the Searl placer. Thereupon the applicant applied to purchase the land claimed. The local officers rejected this application and returned the purchase money for the reason that there was nothing on file to show that the suit of Searl *et al.*, had been finally determined and disposed of.

The applicant appealed, and your office by letter of April 27, 1895, affirmed the action, whereupon this appeal is prosecuted, assigning error as follows:

119 1. It was error for the Commissioner to hold that M. A. No. 4359, is subject to the Searl placer, the latter having no standing before this department. * * *

2. It was error for the local office to receive the so called adverse claim, offered by the Searl placer claimants, as an adverse claim, but said paper should have been received and filed as a protest.

3. There being no pending application by the placer claimants, an application to enter as a lode claim is always in order, the only question being as to width of the lode claims.

It seems that application for patent for the Searl placer was made in 1882. A hearing was had "to ascertain the character of the land and the status of all existing claims." As a result of that hearing, the application for patent was rejected by the local officers, your office sustained that action, and the department affirmed your office judgment.

(Searl Placer, 11 L. D., 441.)

It was contended by counsel for applicant that the judgment in the Searl placer "was a complete and final adjudication;" that the land embraced therein was not placer ground, and could not be entered as such, hence the adverse claim filed by Searl *et al.*, based as it is upon land for which application for patent has been rejected, ought not to be accepted by the department as a legal or proper adverse claim, and its application should be received and patent issue notwithstanding.

120 It is not deemed necessary to enter into an extended discussion of the propositions suggested by counsel. It is sufficient for the purpose of disposing of this case to say that so far as the record here shows the department is ousted of all jurisdiction

until the case now in court is finally disposed of. Under the provisions of section 2326, when the adverse claim is filed all proceedings in the department "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction."

Last Chance Mining Co. *v.* Tyler Mining Co., 157 U. S., 683;
Richmond Mining Co. *v.* Rose, 114 U. S., 576;
Jamie Lee Lode *v.* Little Forepaugh Lode, 11 L. D., 391;
Reed *v.* Hoyt, 1 L. D. 603.

The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it.

Your office judgment is affirmed.

See 22 L. D., p. 527.

Thereupon the defendant introduced in evidence a conveyance showing the transfer of the title originally acquired by the locators of the said Capitol, Clipper, Castle and Congress Lode mining claims to the defendant in this suit.

And the foregoing was the substance of all the testimony introduced on behalf of either side; and thereupon the court announced as follows, to wit:

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APRIL 28, 1898.

ELI MINING COMPANY ET AL.
vs.
CLIPPER MINING COMPANY ET AL.

COURT: "I am not going to decide this case just at this time, but will let you know just what I intend to do so far as the evidence is concerned. The court is satisfied from the evidence that the Searl placer was duly located, as required by the law, in 1877, and that the annual labor has been performed, as required by law, to the present time. The court is further satisfied that the defendants have discovered a lode claim within the boundaries of the Searl placer, but that the discovery was made subsequent to the location of the placer. The questions to be determined in this case are: Has the locator of the placer the exclusive right to the possession, and can a prospector enter within the boundaries of the placer and discover a lode claim before application for a placer patent is made? Those are the questions involved that I would like to have you furnish me briefs and arguments on, and I will then decide the case, and will enter the decision as of to-day, and the exceptions to the decisions may also be made as of to-day.

Plaintiffs shall have one week to file their briefs, and the defendants one week thereafter to file their answer; that is, one week after service of the answer is had; and plaintiffs shall have one

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week after service to reply." To which action of the court in finding the Searl placer to be a valid placer mining claim the defendant then and there excepted.

And afterwards said counsel having submitted arguments on the question, the court did enter judgment in favor of the plaintiffs, finding as a matter of law that the said defendant had no right to enter within the limits of the Searl placer and locate the lode mining claims mentioned herein, which said opinion and judgment of the court was in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
County of Lake, }

In the District Court.

THE ELI LAND & MINING COMPANY ET AL., Plaintiff-, }
v. }
THE CLIPPER MINING COMPANY, Defendant. }

This cause having been tried by the court and the court having found *that* the evidence that the ground in controversy was a valid and subsisting location known as a placer mining claim; that plaintiffs are the owners and were in possession at the time alleged in the complaint.

And the court having requested counsel to submit briefs
123 and citation of authorities upon the question.

Has the locator of a placer the exclusive right to the possession thereof, and can a prospector enter within the boundaries of a placer claim and discover a lode claim before application for placer patent is made?

The briefs presented by counsel having been carefully examined the court finds that a placer claim is by the statutes of the United States defined as "all forms of deposit, excepting veins of quartz or other rock in place, and shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings as are provided for veins or lode claims."

Chief Justice Waite in the case of Belk *vs.* Neagher, 104 U. S. says, "A mining claim perfected under the law is property in the highest sense of that term."

In Gwillim *vs.* Donnellan 115 U. S. a later case he says: "A valid and subsisting location of mineral lands made and kept up in accordance with the provisions of the Statutes of the United States has the effect of a grant by the U. S. of the right of present and exclusive possession of the lands located." If when one enters on land to make a location there is another location in full force which entitles its owner to the exclusive possession of the land, the first location of the land operates as a bar to the second.

This doctrine has been announced by the supreme court of California in Quigley *vs.* Gillett *et al.* 101 Cal. and by the su-
124 preme court of Colorado in Armstrong *vs.* Lower 6th Colo. Omar *vs.* Soper 11 Colo. McFeters *vs.* Pierson 15 Colo. Seynore *vs.* Fisher 16 Colo. Girard *vs.* Carson, 22 Colo. These decisions seem to have been concerning the location of lode mining

claims. There seems to be no good reason why the same rule should not prevail in placer mining claims.

Since examination of authorities in this case I feel compelled to make a different ruling from that made in a similar case in the district court of Pitkin county.

Therefore the locator of a placer mining claim has the exclusive right to the possession thereof; and a prospector cannot enter within the boundaries of a placer and discover a lode claim unless there has been an abandonment by the placer claimants.

The defendants having entered upon a valid subsisting location of a placer mining claim owned by and in the possession of the plaintiffs did not initiate any right whatever.

It is therefore considered ordered and adjudged that plaintiffs are the owners of and entitled to the possession of the ground in controversy in this action by virtue of a compliance with the laws of the United States and the State of Colorado.

Judgment will therefore be entered in favor of the plaintiffs for the ground in controversy and for costs.

THOMAS A. RUCKER, *Judge.*

125 To which finding of the court counsel for defendant then and there duly excepted; and afterwards judgment was entered in said cause in accordance with the said opinion and finding of the court, to which judgment counsel for defendant then and there excepted.

And forasmuch as the matters and things herein set forth do not fully appear of record counsel for defenda-ts have prepared and tender this their bill of exceptions to the judgment of said court, so that said matters can fully appear of record, which is accordingly done by the judge of said court by signing and sealing the same this 6th day of October, A. D., 1898 as of 9th day of July, 1898, when tendered.

THOMAS A. RUCKER, *Judge.* [SEAL.]

We agree that the foregoing writing and exhibits correctly states and show what *it* purports to state and show. It is understood that we say this without waiver of any rights whatever of our clients in the premises.

CHAS. CAVENDER,
JOHN A. EWING,
Attorneys for Pl'ffs.

We agree to foregoing bill of exceptions.

THOMAS, BRYANT & LEE,
Attorneys for Def't-.

125½ The foregoing transcript is endorsed in words and figures as follows, to-wit:

No. 4115. In supreme court State of Colorado. The Clipper Mining Co., plaintiff in error, *vs.* The Eli Mining & Land Co. *et al.*, defendants in error. Transcript of record, bill of exceptions and assignment of errors. Filed in supreme court this 19th day of Sept. 1899. H. G. Clark, clerk.

And thereafter, and on the 8th day of April, A. D. 1901, the following order of the supreme court of Colorado was entered:

126 In the Supreme Court of the State of Colorado, April Term, 1901.

THE CLIPPER MINING COMPANY, Plaintiff in Error, *vs.* THE ELI MINING AND LAND COMPANY, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Defendants in Error.	4115. Error to District Court of Lake County.

At this 8th day of April, A. D. 1901, this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Lake as also upon the matters assigned for error herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court. It is therefore considered and adjudged by the court that the judgment aforesaid of said district court be and the same is hereby affirmed, and stand in full force and effect; and that this cause be remanded to said district court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said district court in the cause, notwithstanding the said writ of error. It is further considered and adjudged by the court that said defendants in error do have and recover of and from said plaintiff in error their costs in this behalf expended, to be taxed, and that they have execution therefor. And let the opinion of the court filed herein be recorded.

Which opinion was in words and figures as follows, to wit:

127 THE CLIPPER MINING COMPANY, Plaintiff in Error, *v.* THE ELI MINING AND LAND COMPANY ET AL., Defendants in Error.	No. 4115.

Error to the district court of Lake county.

Chief Justice CAMPBELL delivered the opinion of the court.

The plaintiff in error (defendant below) owns four lode mining claims, situate in Lake county, called the Capital, Clipper, Congress and Castle lodes, and the defendants in error (plaintiffs below) own the Searl placer mining claim, within the boundaries of which these lode claims are located. The present controversy relates to the territory thus in conflict. The placer was the prior location, and was made in the year 1877. The plaintiff in error having made application in the land office for patent of its lode mines, the defendants

in error filed therein an adverse claim, and within the statutory time brought this action in the district court of Lake county to enforce it.

The plaintiffs rely upon a prior location of the conflicting territory as part of their placer claim. The complaint is in the ordinary form in actions of this character. After a general denial of the material allegations of the complaint, the answer sets up four separate defenses, all of which grow out of the following facts, which, in varying language, are set up in each defense.

128 On the 12th of December, 1877, A. D. Searl and others located the Searl placer, and on the 5th of July, 1878, applied for a patent therefor. Numerous protests were made against it, and on the 10th of November 1882 an amended application was filed against which protests were likewise made upon the ground that the same was not placer ground, and was only valuable for lode claims, or townsite purposes. The Land Department ordered a special investigation to ascertain the character of the ground and the good faith of the applicant. The special agent declared that the land was not placer ground, and on the strength of his report a hearing was ordered before the local land office of the district, the result of which was a dismissal of the application, for it was not then made to appear, as a present fact, that the ground was distinctively valuable for mining purposes, or that the applicant had made the improvements required by statute. This ruling was affirmed by the Commissioner of the Land Office and in turn by the Secretary of the Interior. Twelve days after the latter's decision, the grantors of defendant company entered upon the ground within the boundaries of the placer location and thereafter located thereon the lode claims in question.

The special defenses sought to be interposed were substantially: *first*, that plaintiff was not entitled to recover because, upon the previous application for a patent of the Searl placer, there was a decision of the Land Department that the ground included within its boundaries was not placer ground, and the attempted location was for that reason void, and such decision was *res adjudicata* of the present controversy; *second*, assuming the existence of a prior

129 valid placer location, nevertheless defendant, prior to the time patent was asked, went upon the placer surface area and made locations of lode claims which were then and theretofore known to exist, and, therefore, in law the same were a part of the unappropriated public domain and subject to location as lode claims.

There was a replication by plaintiffs denying the new and special matters of defense, and upon the issues thus joined, in a trial to the court without a jury, the findings were that the Searl placer was duly located as required by law in the year 1877 and thereafter the annual labor had been performed as the statute provides, and that defendant's grantors had discovered the lode claims within the boundaries, and subsequent to the location, of the Searl placer. Based upon these findings of facts, the conclusion of law was drawn that a prior location of a placer carries with it the exclusive

right of possession of the surface included within the exterior boundaries, and a prospector might not enter thereupon and prospect for, or discover, a lode claim before application for the placer patent is made, unless by abandonment the placer claimant has lost his rights. And there being no evidence of such loss, it was accordingly held that the acts of defendant in entering upon the valid subsisting placer location did not initiate any right whatever. Judgment was therefore entered in favor of the owner of the placer location, and to reverse it this writ of error is prosecuted.

1. It is insisted by plaintiff in error that the Land Department, with which is entrusted the determination of such questions, has declared this placer location void because not on placer ground, and that such determination is decisive of the present con-
130 troversy. It is unquestionably the law that findings of fact by the Land Department as to matters within its jurisdiction are conclusive upon the courts whenever a collateral attack is made upon them. They may, in a proper proceeding, be impeached for fraud or mistake, but not in actions like the present. This rule, however, has no application to the facts in this record. The application for a patent to the placer was rejected, but there was no decision that the ground in question was not placer ground; but merely that, as a then present fact, there was not such a showing by the applicant as entitled him to a patent. Amended applications for a patent of a mining claim are permissible under the practice in the Land Department. There was no attempt finally or definitely to determine that the ground was not placer ground, or that the location was void, and to that effect are its own decisions, as will be seen by reference to the official reports.

7 Copp's Land Owner, 36;
In re Searl Placer, 11 Land Dec. 441;
In re Clipper Mining Co., 22 Land Dec. 527.

In the last case, the Secretary of the Interior, in speaking of the contention made in this very case, says: "The judgment of the department in the Searl placer case went only to the extent of rejecting the application for patent. The department did not assume to declare the location of the placer void, as contended by counsel, nor did the judgment affect the possessory rights of the contestant to it." See also, *Clipper Mining Co. v. Searl*, 29 Land Dec., 137. Indeed, the question as to the character of the land sought to be appropriated by claimants under the public land laws is reserved,—unless under the law referred to some court,—and may be passed upon, by the department until patent issues.

Barden *v.* N. P. R. R. Co., 154 U. S. 288.

131 This court in *Beals v. Cone*, 27 Colo. — (62 Pac. Rep. 948) held that a decision of the Land Department like the one in question is equivalent to nothing more than a judgment as of nonsuit, and not conclusive upon the department itself or upon the parties.

An additional reason why the plea of *res adjudicata* cannot be sus-

tained is that in the former proceedings the parties are not the same as those in the present action.

2. The principal question involved is much more important and difficult of solution. In discussing this feature of the case, it must be considered as established that the Searl placer was an existing valid location at the time of the attempted location of the lode claims. We make this statement as counsel for plaintiff in error themselves admit that such issue was present in the case, and was determined by the trial court upon conflicting evidence, and as bearing upon this point they make no question but that the same was rightly determined. The question, therefore, is presented whether, and if so, in what circumstances, one may, before application for a patent of a prior valid placer location is made, go upon the same for the purpose of prospecting the ground, and thereafter make a location of a lode claim based on a discovery thereafter and thus made of a vein or lode therein.

In *Aurora Lode v. Bulger Hill & Nugget Gulch Placer*, 23 L. D., 95, it was held by the Secretary of the Interior that the discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with, and incident to, the use and operation of the same as a placer mining claim; but that such location does not operate to give the right of possession to known veins or
132 lodes within its limits, or preclude the right of discovery and location thereof by others. It was also held that a judicial award of the right of possession to an adverse placer claimant as against a lode applicant, does not preclude subsequent departmental inquiry upon the allegation of the lode claimant that the placer claim embraced known lodes or veins, where it appears that such question was not at issue before the court for determination by its judgment.

This case was referred to with approval by this court in *Mt. Rosa M. M. & L. Co. v. Palmer*, 26 Colo. 56. In the latter case the facts were that lode claims were known to exist, and were also duly located within the limits of a previously located placer claim before patent of the latter was applied for. A patent for the placer having been issued in such circumstances it was held that, inasmuch as the applicant did not at the time mention the lode claims, or claim them by virtue of lode locations, they were excluded from the grant of his patent. And as it further appeared that the locators of these lode claims went upon the placer ground and made locations upon veins known to exist before the application for patent was made, the conclusion was that the patentee of the placer could not recover possession of the lode claims, for they were properly located. The court said that in making them no right of the placer owner was invaded, and that their validity was not affected by the fact that they were made within the surface boundaries of a prior placer location. For the purposes of the case, it must have been assumed as true that when the entry by the locators of the lode claims was made the lodes themselves were known to exist.

133 If the facts of the case at bar were the same as those in the Mt. Rosa case, we would, under its doctrine, be obliged to reverse the judgment; but they are essentially different in at least one particular to which we shall hereafter refer. But before passing to that, we notice the contention of defendants in error that in Calhoun G. M. Co. *v.* Ajax G. M. Co., 27 Colo. 1 (59 Pac. Rep. 607, 618) we have virtually held that one who has made a valid location of a placer claim has for all purposes exclusive right of possession thereto so long as he complies with the law, and that the territory embraced therein is not subject to adverse location by a claimant of the same ground under a subsequent lode location, though the lode is known to exist before application for patent is made. Our decision in this case was not intended to qualify the doctrine established in the Mt. Rosa case. In the Calhoun case where a lode location was involved, we were not considering, as was true in the Mt. Rosa case, the kind or extent of possession which follows a valid location of a placer claim. What was said in the Calhoun case was true as applied to a lode claim, for the right of possession of the lode claim includes the entire surface area. In the Mt. Rosa case, however, wherein was defined the rights of a placer claimant, we said that a placer location gives a qualified possession of the ground located;—that is to say, it confers upon the owner the exclusive right of possession of the surface area for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give the right of possession to known veins within its limits.

134 It is obvious that the facts of the case in hand do not bring it within the principles laid down in the Mt. Rosa case. If, in the case at bar, the lode claims were known to exist at the time of the entry of defendant's grantors upon the Searl placer, under the decision in the Mt. Rosa case the entry was not unlawful; but if, on the contrary, the veins were then unknown, by the same decision the right of possession of this ground belonged to the owners of the placer location. Their right of possession included these unknown veins and the entry for prospecting was a trespass, and no title could thereby be initiated.

As the evidence was not brought up in the bill of exceptions, we must assume in support of the judgment below that the proof was against the defendant upon this point. Indeed, the specific finding of the trial court that defendant's grantors went upon plaintiff's prior existing placer location and *discovered* and located lodes therein, involves the finding that the lodes were unknown at the time of the entry; for if they were known, they were not discovered by the prospectors, but were already subject to location by them; and if then unknown, the placer owner was entitled to their exclusive possession, and entry upon them by others constituted a trespass and could not initiate title.

Our conclusion, therefore, is that one may not go upon a prior valid placer location to prospect for unknown lodes and get title to lode claims thereafter discovered and located in this manner and

within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. If the trial court intended to rule that in no circumstances may one, before application for a patent of a placer claim, go upon the ground within its exterior boundaries for
135 the purpose of locating a lode, it went too far; yet as general language in an opinion must be taken in connection with the facts of the particular case, the ruling here should be limited to the facts disclosed by the record, and no prejudicial error was committed. For, under the authorities, a prospector may not enter upon a prior placer location for the purpose of prospecting for, or locating, unknown lodes or veins; and to uphold the judgment we must presume that the evidence before the trial court showed that the veins or lodes upon which defendant's grantors based their locations were unknown when they entered upon the Searl placer for the purpose of prospecting.

The mere fact, then, that the judgment may have been based upon a legal proposition—too broadly stated as a universal rule—that in no case may a location of a lode claim be made within the boundaries of a prior valid placer location,—a legal conclusion which, as we have said, is only partially right,—is not, under the facts of this case, sufficient to work a reversal; for certainly a lode location may not thus be made except of a known lode. Though a prospector may believe that within the limits of a placer location a lode may exist and by development work be disclosed, he has not the right to enter thereupon for the purpose of exploiting the ground to confirm his belief.

The judgment is affirmed.

Affirmed.

136 I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original opinion of the supreme court of the State of Colorado, filed in the above entitled cause on the 8th day of April, A. D. 1902, and of an original judgment entered in said cause on said day, and now remaining of record at my office.

Witness my hand and the seal of the court, affixed at my office, in the city of Denver, this 26th day of March, A. D. 1902.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk Supreme Court,
By —— ——, *Deputy.*

137 And thereupon, and on the 26th day of July, A. D. 1901, the plaintiff in error in the above entitled cause appeared by Thomas, Bryant & Lee, its attorneys, and filed its petition for rehearing and brief in support of same, which are in words and figures as follows, to-wit:

138 In the Supreme Court of the State of Colorado.

THE CLIPPER MINING COMPANY, Plaintiff in Error,
vs.
THE ELI MINING AND LAND COMPANY *et al.*, Defendants in Error.
} Petition for Rehearing.

Comes now the plaintiff in error in the above entitled cause, and petitions the court for a rehearing of the same for the following reasons, to-wit:

1. The court erred in its first proposition of law in holding that the decision of the Secretary of the Interior in the matter of the protest against A. D. Searl's application for a patent did not decide that the ground was not placer ground, and in holding that said judgment of the Land Department was not conclusive.

2. The court erred in its second proposition of law in holding that as a matter of fact, the evidence in the court below did not show that the lode claims located by the plaintiff in error were known lodes at the time of the location, and the court erred in its proposition of law in holding that a lode location cannot be made within the limits of an existing placer location, except upon a known lode.

3. The court erred in its construction of the two cases of The Aurora Lode *v.* The Bulger Hill and Nugget Gulch Placer, 23 L. D. 93 and in its construction of the Mt. Rosa M. M. & L. Co. *v.* Palmer 26 Colo. 56.

139 For the reasons stated, the court should grant a rehearing and withdraw its former opinion, and in support of this motion the following brief is herewith filed.

THOMAS, BRYANT & LEE,
Attorneys for Plaintiff in Error.

140 In the Supreme Court of the State of Colorado.

THE CLIPPER MINING COMPANY, Plaintiff in Error,
v.
THE ELI MINING AND LAND COMPANY *et al.*, Defendants in Error.
} Brief in Support of Petition for Rehearing.

The court in the opinion handed down passes upon two propositions. First upon the effect of the decision of the Land Department, that the ground in controversy was not placer ground; and second, the proposition as to the right of a prospector to discover and locate a lode within the limits of a mere possessory placer location. We believe that the court reached a conclusion upon each of these points opposed to all of its own decisions, and to all of the decisions of the Federal courts, both *nisi prius* and final that have passed upon these questions.

We believe that we can demonstrate that inadvertently the court has misconstrued the facts in the cases previously tried before it,

and that having done this and having also shown that the decision is opposed to the decisions of the Supreme Court of the United States, the court will grant our petition for rehearing and withdraw the opinion already filed. We will take up these points in the order indicated.

1. Substantially stated, the facts in regard to the application to the Government for a patent upon the Searl placer are, that a patent was applied for and after thorough investigation was refused because the Land Department decided that the land was not valuable for placer mining purposes. This court says "the application
141 for a patent to the placer was rejected but there was no decision that the ground in question was not placer ground; but merely that as a then present fact, there was not such a showing by the applicant as entitled him to a patent." The court then says that amended applications for patent are permissible, and that there was no attempt finally or definitely to determine the character of the ground. We submit that when the court says the Land Department rejected the application for a patent because the land was not then of a sufficient placer character to entitle the applicant to a patent, the controversy is at an end. We would like for the court to answer this one question: If a locator is not entitled to a patent because he has not discovered mineral within the limits of his location, does he have any possessory rights under his location? In other words, can a patent be refused upon a ground that destroys the right to make a location and the location itself remain good? We readily concede that the Land Department itself, until a patent finally issues, has a right to reverse its own rulings, has the right to consider an amended application, but until it does so its solemn adjudications once made remain binding upon all third parties. If a party applies for a patent upon a placer or lode claim and his application is rejected because he has not completed his five hundred dollars' worth of work, or because he has failed to post his patent application upon his claim, or for any reason connected with the application itself as distinguished from the possessory title, then the refusal to grant a patent does not interfere in the slightest degree with his possessory title, but if the application is rejected for any rea-
142 son, that goes to the very foundation of his right to hold the ground as against the United States, then we insist that its rejection destroys not only the application for a patent, but whatever possessory rights the applicant may have. As in this case when the Land Department held that the ground is non-placer in character, what possessory title can possibly remain? As said by Judge Hallet in passing upon this identical proposition and with reference to this identical placer, the rejection of the placer throws the ground open to relocation just the same as any other portion of the public domain.

The Land Department has expressly held that there was a decision declaring this ground to be non-placer. In the case of Clipper Mining Company *v.* Searl, the Commissioner of the General Land Office on the 20th of December, 1898, expressly stated that the

Searl placer was rejected because of the non-placer character of the land, and this decision of the Commissioner's was affirmed in 29 L. D. 137. We submit with this petition a copy of the decision of the Commissioner in that case. We urge this matter most strongly upon the attention of the court.

2. The proposition as to the right of a prospector to discover and locate a lode within the limits of a mere possessory placer location. The court begins its discussion of this second proposition with the statement that counsel for plaintiff in error admitted that the Searl placer was an existing valid location at the time of the attempted location of the lode claims. Counsel as a matter of fact admits no such thing. We do admit that there was conflicting evidence in the court below on this point, and that the trial court did decide as a matter of fact that a valid placer location was made. We are forced to admit these things because they appear in the record.

143 The judge who tried the case below is the only man living or dead who ever held office, and before whom this question has ever been presented who decided the facts in this way. In all former contests in all suits in the Federal courts before Judges Riner and Hallett, it has always been held without an exception that this ground was not placer ground, and could not be located as such. What we do insist upon, and have insisted upon, is that even conceding for the sake of argument that this was a valid placer location, yet the prospector had the right to go within its limits and locate veins found therein. The decision of the court in this case is the first instance of record of any tribunal deciding the contrary.

Both cases cited in the opinion of the court were upon identically the same facts as those presented in the case at bar. It will take but a few moments to demonstrate this assertion beyond controversy. We will first call attention to the case of the Mt. Rosa Company *v.* Palmer. We understand the court to make a distinction between the Mt. Rosa case and the case at bar. It is contended in the opinion of the court in the case at bar that the lodes mentioned in the Mt. Rosa case were known to exist at the time the Mt. Rosa placer was located, and it is said that a prospector can only go within an existing placer location and locate lodes which are known to exist. In the Mt. Rosa case as a matter of fact, the lodes were not known to exist at the time the placer was located, or even at the time the lode claims themselves were located. We quote the following from Mr. Justice Goddard's opinion in that case:

144 "This is an action instituted by the appellee, plaintiff below, against appellant, The Mt. Rosa Mining, Milling and Land Company defendant below, to quiet his title to two lode mining claims situate within the exterior boundaries of a certain tract of land conveyed to appellant by a Government patent, as placer mining ground.

"Upon the trial it was admitted that the lode claims were formally and regularly located as provided by law, except as to the discovery of mineral therein; that affi*a*nts in lieu of labor, for the years subsequent to their location, were properly filed by the owners, that by

proper conveyances the plaintiff became, and was, the owner of whatever title had been acquired by virtue of such locations.

"It was further agreed that the placer owned by the defendant was located some time prior to the location of the lode claims; that the application for a patent was not made until after their location; that the defendant, through proper conveyances, was the owner of the placer.

"The only question of fact that remained in dispute *were* whether or not a vein or lode was discovered and known to exist in the Handy Andy and Newman claims, within the boundaries of the Mt. Rosa placer at the time appellant applied for patent for such placer, on August 18, 1892."

It will be seen from this quotation that it was admitted that lode claims were located within the limits of the Mt. Rosa placer, before any lodes were discovered within the limits of the lode locations.

The lode claims were formally and regularly located, except
145 as to the discovery of mineral therein. This is a most important exception, and utterly destroys any distinction between that case and the one at bar. The only question of fact in the Mt. Rosa case was, whether between the date of the location of the lode claims and the date of the application for a patent upon the placer, mineral was discovered and known to exist in the claims. We submit that if this court or any court can draw the slightest distinction between the facts in that case, and the case at bar, we would like to have it do so.

In the case at bar, the Searl placer was located in 1877, and the lode claims in controversy were located in 1890. In 1893 the lode claims applied for patent and were adversed by the placer location. If an adverse proceeding can be termed an application for a patent, then this was the time at which the question of the known or unknown character of the lodes was to be determined. In the Mt. Rosa case the Mt. Rosa placer was located and shortly afterwards the Handy Andy and Newman were located within its limits, but upon no known lodes. Before the placer applied for a patent, however, the owners of the lode claims discovered veins within their limits. We have therefore this remarkable condition that in two cases with almost identical facts this court holding in one case that a placer is entitled to the ground and in the other that the lode claimants are entitled to the ground. We submit, that to make their decisions consistent, and to mete out justice to all suitors alike, the opinion heretofore announced in this case should be withdrawn, and the same ruling laid down that was announced in the Mt. Rosa case.

146 Turning to the Aurora Lode case, we find the same condition of affairs to exist. The court says that the department decided in the Aurora Lode case that the location of a placer claim does not operate to give the right of possession to "*known*" veins or lodes within its limits, or preclude the right of *discovery* of such lodes by others. We would like the court to point out any place in that decision where the word "known" is inserted before veins or lodes

as stated in the opinion of this court. The first paragraph of the syllabus reads as follows:

"The discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with and incident to the use and operation of the same as a placer mining claim; such location, however, does not operate to give title or right of *possession to veins or lodes* within its limits or preclude the right of *discovery and location* thereof by others."

We have underscored that portion of the syllabus where the word "known" ought to be, if it was ever used in the connection suggested by this court. No such word as "known" is there to be found. We quote the following:

"(1.) As to the effect of the placer locations:

"In your decision of April 1, 1896, you hold in substance that such a location gives to the locators or claimants under it a right to all veins or lodes included within its boundaries, though not claimed as such, or even discovered at the time; and that such right in the placer claimant can not be affected by any subsequent discovery or location by another, of a lode claim within the
147 boundaries of the placer claim. In other words, a placer claim, once lawfully located distinctively as such, gives to the owner thereof the right to appropriate to his own use and benefit any lodes or veins of mineral bearing ores, which may thereafter be discovered and located by another within the limits of his claim; and all he will have to do in order to procure title to such subsequently discovered lodes or veins, in the discovery and location of which he took no part, would be to include them in his application for patent when filed, and pay the additional price per acre therefor as required by law. This I understand to be the logical effect of your said decision.

"It does not appear to me that such is the law. No case has been cited in which the precise question has been decided, nor am I aware of any.

"Under the mining laws of the United States property rights in veins or lodes containing mineral bearing ores are acquired in the first instance by discovery and location. It has frequently been held by the courts that a mining claim once perfected under the law of discovery and location, becomes property in the highest sense of that term (Sullivan *v.* Iron Silver Mining Company, 143 U. S., 431–434; Belk *v.* Meagher, 104 U. S., 279–283).

"That there can be no valid location of a mining claim without discovery to support it will hardly be questioned. And a location on account of the discovery of a vein or lode can only be made by the discoverer, or one claiming under him. If the title to the discovery falls, so must the location which rests upon it. But if the discoverer has himself perfected a valid location on account of his discovery, no one else can have the benefit of that location,
148 unless he should abandon his prior right (Gwillim *v.* Donnellan, 115 U. S., 45–50).

"It is also to be remembered that the two classes of mineral deposits, namely, vein or lode deposits, and placer deposits, may exist in the same superficial area, and that they may be discovered, located and claimed by the same, or different persons, and patented accordingly. This is not only in accord with the plain import of the statute (sec. 2333 R. S.), but is also well settled by both judicial and departmental decisions (Reynolds *v.* Iron Silver Mining Co., 116 U. S., 687–697; South Star Lode, 20 L. D., 204). The said two classes of mineral deposits are entirely separate and distinct from and exist wholly independently of each other. The mining statutes appear to be founded upon the well known and universally recognized difference in their character. The vein or lode of mineral bearing quartz is more valuable than the surface and placer deposits, and Congress has accordingly fixed the price per acre, as represented by the superficial area, of the former at $5.00 per acre, and of the latter but $2.50 per acre. This was stated in substance by the Supreme Court in the case of Reynolds *v.* Iron Silver Mining Co. just cited, wherein the court also said it had been shown by experience that both these classes of mineral deposits might be found in the same superficial area, and that § 2333 of the Revised Statutes makes provision for such a case. That section is as follows:

"'Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein
149 or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in § 2320 is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

"This section, as was stated by the Supreme Court in the case of Noyes *v.* Mantle, 127 U. S. 348–352, and in other cases both prior and subsequent thereto, makes provision for three classes as follows:

"1. When one applies for a placer patent, who is at the time in the possession of a vein or lode included within the placer boundaries, he must state the fact and then, upon payment of $5.00 per acre for such vein or lode claim and 25 feet of surface on each side thereof, and $2.50 per acre for the placer claim, a patent will issue to him covering both the placer claim and the lode.

"2. Where a vein or lode is known to exist at the time within the boundaries of the placer claim, an application for patent
150 for the latter which does not include an application for the vein or lode will be construed as a conclusive declaration that the placer claimant has no right of possession to the vein or lode.

"3. Where the existence of a vein or lode in a placer claim is not known at the time of the application for patent, title will be conveyed by such patent to all veins or lodes within its boundaries.

"The present case, if the allegations of the protest by Bennett are true, would seem to come within the second of the three classes named, if within any of them. Certainly it does not belong to either of the other two. The original locators of the placer claims, assuming the allegations in the protest to be true, were not at the date of the placer locations in the possession of the vein or lode, and did not by their said locations lay any claim thereto. Theirs were distinctively placer locations. They could not have had any just claim to the lode because, as we have seen, they were not the discoverers thereof, and could not therefore lawfully locate it, or assert any property rights in it. The lode claim was discovered by others; was located by others; and upon its location, as property under the law, belonged to others. Nor was the present placer claimant in possession thereof at the date of his application for patent, at which time and long prior thereto, the existence of the vein or lode within the limits of the placer locations, was a well known fact.

"But whether this case comes wholly within the said second class or not, as to which more will be said when we come to consider the next question raised by the appeal, it cannot longer be doubted that the question as to whether lodes or veins of mineral bearing quartz pass under a patent covering a placer claim (is to be deter-
151 mined by the fact of the known or unknown existence of such veins or lodes at the date of the application for patent by the placer claimant, and not at the date of the location of his claim). If at that date the veins or lodes were known to exist and were not included in the application for patent, no title to them can pass by the patent; if not known to exist at that date, the placer patent will carry the title to them (South Star lode, *supra*, and cases cited).

"This being the settled law, both by departmental construction and judicial decision, as is also, as we have seen, that a mining claim, once discovered and duly located becomes the property of the discoverer or locator, and in further view of the fact, as well as the settled law, that both placer and lode claims may and do exist within the same superficial area, and may be located by and patented to different owners, it would be strange indeed if a placer location can, as such, operate either to withdraw from subsequent discovery and location any lodes or veins within its boundaries by any one other than the placer claimant, or to appropriate the benefit of such discovery and location or made by another to the use and benefit of the placer claimant. This would give to the placer location an effect, in my judgment not contemplated by the mining laws. Such

a location, in and of itself, does not establish any right in the claimant under it to the superficial area within its boundaries except as a placer claim or mine. Of its own force, it cannot operate to give title to or property rights in any veins or lodes within its boundaries. (True, a placer mining claim becomes property as such by discovery and location the same as a vein or lode claim, but it cannot and does not of itself in any sense give title to or property rights
152 in veins or lodes, nor can it, in my judgment, operate to preclude a subsequent lawful discovery and location of veins or lodes within its boundaries.)

"If the contrary were the law, the more valuable of the two classes of mineral deposits, entirely separate and distinct from each other, but frequently existing in the same superficial area, as we have seen, might be absolutely withdrawn from exploration and purchase, by a location covering a claim to the less valuable, or in cases like the present one, the effect would be to give to the locators of claims of the latter class all rights attaching by the discovery and location of claims of the former class, which are held to be property rights in the highest sense of that term. I cannot believe such is the law, and my conclusions, therefore, upon this branch of the case, are:

"'That while the discovery and location of a placer mining claim establishes in the owner the right to the possession of the superficial area within its boundaries for all purposes connected with and incident to the use and operation of the same as a placer mining claim, such location does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others.'"

Aurora Lode *v.* Bulger Hill and Nugget Gulch Placer, 23 L. D. 95.

We most respectfully and earnestly ask this court to point out in this language any such use of the word "known" as claimed in the opinion of this court in the case at bar. One paragraph of the above quotation was cited with approval by this court in the Mt. Rosa case, and the court also cites with approval § 413 of Mr.
153 Lindley on Mines. If there is any tendency direct or remote in either of these authorities to sustain the position reached by this court in the case at bar, we are willing to abandon this petition for rehearing at this point and say nothing more. But the court will see how distinctly over and over again the Secretary of the Interior says, that a placer location does not confer any right of any nature or description to veins or lodes included within its boundaries, and that said veins and lodes are still open to exploration, discovery and location by others than the placer locators. All three words, exploration, discovery and location are distinctly and emphatically used by the Secretary in his opinion. The Land Department expressly denied the right of the placer claimant to the lodes, because he had never discovered them, and had never located them. The same rule is applicable to the case at bar. The owners of the Searl placer never discovered these lodes, never located them

and does not now even claim in his pleadings in this case, any title to these lodes. That portion of the opinion of the Secretary quoted by this court in the Mt. Rosa case, says that a placer location does not operate to preclude a subsequent and lawful discovery and location of the veins or lodes by others within its boundaries.

Is there any question in the case at bar as to there being a lawful discovery and location of the four lode claims? In other words, this court in the Mt. Rosa case has said that a person may go within the limits of a placer location and discover and locate a vein. In the case at bar it takes away this dearest privilege of the miner, namely, that of discovering a lode, and simply says that he may locate a lode which has already been discovered. The whole
154 position of the court in the case at bar is inconsistent with and diametrically opposed to everything it has ever said upon this subject.

But what right has the court to say, under the record in this case, the locators of the lode claims did not locate the same upon known lodes? The court says that the evidence was not brought up in the bill of exceptions. We insist that under all proper rules for preparing bills of exception the evidence is all in the bill. The bill of exceptions gives the substance of the testimony that was offered and then says that the foregoing was in substance all of the testimony introduced in behalf of either side. Under the adjudications it is always the better practice, and the judge ought not to sign a bill of exceptions unless the evidence is condensed in this way.

Caldwell *v.* Parks, 50 Calif. 502;
Harvey *v.* Vande Mark, 71 Ills. 117;
Grissell *v.* Flower Feed Co. 36 N. E. Rep. 452;
Tyree *v.* Parham, 66 Ala. 424;
Cohen *v.* Wallace, 107 Calif. 133;
Karasich *v.* Hasbrouck, 28 Wis. 569.

In the case at bar there was no controversy upon the question of the existence of these lodes. By looking at pages — to — the court will see what testimony of the witnesses consist of. The plaintiff introduced evidence tending to prove the location of this placer claim. The defendants introduced evidence showing that the ground was not placer and then proved the location of its lode claims, and in addition to that gave testimony to the effect that these lodes were known to exist in 1880 and 1881. Not a word of testimony was introduced by the plaintiff in rebuttal to counteract this evidence.

When we turn to the pleadings we find that the plaintiff sets up title to the ground in controversy as a placer claim. The
155 defendant denies that it is a valid placer claim and alleges the lode locations, and that they were made upon known lodes. In reply the plaintiff denies not only that these were known lodes, but denies most emphatically the existence of any lode within the ground at all. The trial court in its findings finds in so many words that the defendants have discovered and located valid lode

claims. That is to say, upon the issues as framed by the pleadings the issue as to the existence of lodes within this ground has been decided against the plaintiff. The court below made no finding as to when these lodes were first known to exist, but the evidence is that they were known to exist in 1880 and 1881, and defendants are entitled to the presumption that they were known to exist previous to the date of location. In an adverse suit both parties are plaintiffs, and an appellate court must indulge the same presumptions for both that it does for one. The defendant asserted title to the ground by virtue of lode locations. The court found that it had located upon the lodes. The statute provides that there must be a lode before a location. We are therefore entitled to the presumption even though there had been no evidence upon the subject, that these lodes were known to exist at the date of their location. We call the court's attention especially to the following testimony found upon pages — and — of the transcript:

"The defendant to maintain the issues upon his part, then had sworn as witnesses John McNulty, A. C. Saltzman, Frank Fox, J. Lowney, Thomas J. Rinker, J. H. Reed, Duncan McClelland, Joseph Doyle, William Emery, Robert Berry, and Timothy Kay. These witnesses testified that they had each examined or watched
156 others examine the ground in question from two to three hours each, or longer; that the surface of said ground was covered with wash or debris; that in washing or panning said ground only colors had been found; some of said witnesses testified that said ground was not placer ground, and in their opinion could not be made to pay as placer ground; and the defendant also had sworn as witnesses J. W. Newall, Joseph Doyle, and J. K. Carleton, who testified that they had been familiar with the ground since 1880, and that since that time valuable lode deposits had been discovered and known in the region in which this placer is located, and the said J. K. Carleton testified that he believed that there was one large mineral bearing vein which underlaid the whole of said placer, dipping under the same; that he knew of evidences of said vein extending under said placer from workings in the Lucy B. Hussey and other lodes as far back as 1881; and said Newell, Doyle and Carleton testified that said lode or vein has, since 1895, been traced and discovered under said placer. Said witness together with S. M. Carleton, also testified to the discovery and location of the Castle, Clipper, Congress and Capital Lode mining claims; that said claims were located on the 25th of November, 1890; and said Carletons testified that at that time the said mineral bearing vein was known to underlie said placer."

We also ask the court to note in the pleadings that the plaintiff denies *in toto* the existence of any lodes within the ground at any time. In other words, the plaintiff is relying solely upon the proposition that this is placer ground, pure and simple, and never was and never can be anything else. So that the actual evidence and the presumptions of law which the court must make both lead to

the conclusion that these lodes were known to exist long prior to their location.

157 The court in the conclusion of its opinion attempts to escape from the dilemma to which the other portions of the opinion leads it, that unless the placer owner has abandoned his claim, waives the trespass or by his conduct is estopped to complain of it, a third party cannot enter the claim and discover a lode existing therein. We would most respectfully ask the court what it means by waiving a trespass or conduct that will estop the placer claimant from complaining? The record in this case shows that these lodes were located in 1890. That thousands upon thousands of dollars were expended in the succeeding years for their development. That they were made into productive mines. That not one word of protest was ever uttered by the placer claimant, and not until three years after the location when a patent was applied for by the lode claimants, did any objection come from the owners of this so-called placer. If this is not an estoppel, we do not understand the meaning of these terms. But let us suppose that the placer claimant did notify the lode claimant not to prospect upon his placer ground, and expressly in so many words objected to the trespass, yet notwithstanding these facts, the prospector does uncover a few inches of soil of the placer and discloses a lode which he proceeds to work and locates. He continues to work it for three years, and then applies to the Government for a patent. The placer claimant has never asked for a patent. The lode has been discovered within the limits of his placer claim and is known to exist. The lode has been so known for three years. The placer claimant has never attempted to locate it or assert any title to it in any way, shape or form, except by claiming the ground during all of the time as a placer claim as against the lode claimant, would

158 not this be a complete waiver of any rights to the lode? It is conceded by this court, at least, it is conceded by its written opinions in the past, that no title comes to a known lode within a placer claim except by location thereof; but here a lode has been known to exist for three years, and the placer claimant has made no location of it, can he assert any title to that lode as against any one who has made a location thereof?

The court concedes even in the opinion in this case that the lode may be located by a third party when it is ascertained that it is in existence, although it denies that it may be discovered by a third party. Suppose the discovery to be a trespass and the original location unlawful, if no claim to the lode is made by the placer claimant within a reasonable time, is not this a complete and final waiver on the part of the placer claimant of the lode?

We presume that this court will follow the Mt. Rosa case to the extent at least to say that if the Searl placer had applied for a patent in 1892 without including these known lodes or saying anything about them, that it would have waived its right to claim them. Could it be denied in this event that the owners of the placer had abandoned or waived any right to claim these lodes?

We would most respectfully ask, Do the owners of a placer acquire any greater rights by not asking the Government for a patent? In other words, is a possessory title stronger and better than a patent title and can there be any more of a waiver or abandonment of the lodes by a failure to locate or claim them, than by applying for a patent, and failing to claim them in the application.

159 It is settled law that a title to a known lode can only be obtained by a location of the same as a lode. These lodes even under the reasoning of this court were certainly known to exist when discovered, and they were discovered certainly in 1890, even though their discovery could be deemed a technical trespass. What title then had the Searl placer to them in 1893, when it filed its suit, in 1898 when the same was tried, or in 1901 when it was passed upon by this court? What vestige of a right under any law, decision or ruling has the Searl placer to claim one ounce of ore extracted from any of these lodes? What can be termed a waiver if the history of this case does not show that the owners of the Searl placer have waived their rights to these lodes?

This case goes even beyond this. Plaintiffs have virtually filed a disclaimer as to these lodes. They have denied their existence in their solemn pleadings. They have no pleading and no evidence in this case that entitles them to claim these lodes or ask a judgment for them. We submit that under the facts the pleadings and the evidence the owners of the Searl placer cannot now and could not when the suit was filed deny the right of the locators of the Clipper to locate the lodes.

We submit for the reasons given above it is the duty of the court to grant our petition, and order a rehearing where all of these matters can be discussed at length.

Respectfully submitted,

THOMAS, BRYANT & LEE,
Attorneys for Plaintiff in Error.

160 And thereupon, and on to-wit, March 3, A. D. 1902, the following order denying said petition for rehearing was entered by the supreme court:

THE CLIPPER MINING COMPANY, Plaintiff in Error, v. THE ELI MINING AND LAND COMPANY, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray, Defendants in Error.	4115. Error to District Court of Lake County.

At this 3d day of March, A. D. 1902, upon consideration thereof, it is ordered by the court that the petition of plaintiff in error to file a supplemental transcript be and the same is hereby denied. And it is further ordered by the court that the petition of plaintiff in error for rehearing herein be and the same is hereby denied. And let the opinion of the court filed herein be recorded.

Which opinion is in words and figures as follows, to-wit:

161 No. 4115.

On application to file supplemental transcript and on petition for rehearing.

Chief Justice CAMPBELL delivered the opinion of the court.

1. After the petition of plaintiff in error for a rehearing was presented, it asked leave to file a supplemental record to bring up proceedings in the district court which occurred subsequent to final judgment, in which, for the first time, alleged errors of that tribunal are called to our attention.

These proceedings were attacked by motions below upon which the rulings were against plaintiff in error. The objections and exceptions thereto were not preserved by a bill, as required by our practice, and for this reason alone they might now be disregarded. But, in addition to this, some of the matters embodied in the supplemental transcript were within the knowledge of plaintiff in error at, and prior to, the trial below, and all of them before the original bill of exceptions was approved and signed by the trial judge, and long before the original transcript was lodged in this court. They were, therefore, as well known to plaintiff in error before the cause was argued and submitted in this court, and before the original opinion was handed down, as they were when this application was made. It is clear that the request should be denied. Our practice precludes a party, upon a petition for a rehearing, to raise new questions.

Lamar Co. *v.* Amity Co., 26 Colo. 370;
Orman *v.* Ryan, 25 Colo. 383;
Water Co. *v.* Irrigation Co., 24 Colo. 322.

162 2. The petition for a rehearing is based upon three propositions: (*a*) The court erred in holding that the Secretary of the Interior in the matter of the protest against Searl's application for a patent did not decide that the ground was not placer ground, and that said judgment of the Land Department was not conclusive; (*b*) there was error in holding that, as matter of fact, the evidence in the court below did not show that the lode claims located by the plaintiff in error were known lodes at the time of the location, and that there was further error in holding that a lode location cannot be made within the limits of an existing placer location except upon a known lode or vein; (*c*) the court misconstrued the effect of the decisions in the cases of *Aurora Lode v. Bulger Hill and Nugget Gulch Placer*, 23 L. D., 95; and *The Mt. Rosa M. M. & L. Co. v. Palmer*, 26 Colo., 56.

(*a.*) We can add nothing under this head to what is contained in the foregoing opinion. No authority is cited and no argument now made which were not before us upon the original hearing. The authorities already referred to clearly refute the position of plaintiff in error. The decision of the Land Department in the case at bar

was precisely the same in principle as that considered in the case of *Beals v. Cone, supra;* and plaintiff in error concedes that if this court still adheres to the doctrine of that case, as it does, the present contention falls.

In this connection we may add that, if the position of plaintiff in error is sound, it has no standing in this court; for the first decision ever made by the Land Department with respect to the mineral character of the Searl placer was in favor of the placer claimant in a contest between him and a town site claimant. See 7 Copp's
163 Land-owner, 36. Such being the first decision of the Land Department, if, as plaintiff in error contends, it is *res adjudicata* as to the mineral character of the placer claim, the controversy is ended, and plaintiff in error cannot reopen that question.

(*b.*) Where in the original opinion it is intimated that plaintiff in error admits that the trial court rightly determined that the Searl placer was an existing valid location at the time of the attempted location of the lode claims, it was not our intention to say that the admission was voluntary, but only that the finding having been made upon conflicting evidence, under the established rule in this jurisdiction the plaintiff in error, as well as the court, for the purposes of this review, is concluded by it. The transcript does not purport to contain all of the evidence. The abstract recites that certain evidence was introduced in behalf of the plaintiffs tending to establish their cause of action, and certain other testimony in behalf of the defendant to establish its defences. In such circumstances, we cannot investigate to ascertain on which side the preponderance of the evidence is. Indeed, there has never been any serious contention that the findings of fact of the trial court were not sustained by the evidence.

In the case of *The Fanny Rawlings M. Co. v. Tribe, ante* p. —, decided at this term, it was said, "Appellate courts must assume, in the absence of specific and unambiguous findings of fact to the contrary, that the lower court intended to find those facts which are responsive to the issues made by the pleadings, and essential to the judgment rendered." Let this rule be applied to the case at bar.

The defendant alleged and the plaintiffs denied, that the lode
164 claims were known to exist before application for a placer patent. The findings were that the locators of the lode claim had not the right to go upon the territory included within the placer location for the purpose of prospecting and locating lodes. Possibly, we have not hitherto made sufficiently prominent the fact that a patent for the placer was applied for long before an attempt was made to locate the lode claims, the original application in the year 1878 or 1879, the exact date being immaterial. An amended application was made in the year 1882, which was rejected by the Secretary of the Interior in November, 1890, and it was not until after this last date that the locators of the lode claims made an entry upon the placer location.

It may be true, as counsel for plaintiff in error says, that a belief existed in Leadville that this Territory was underlaid with mineral,

but, so far as we are able to determine, there does not seem to have been any knowledge of that fact, so far as the territory in controversy is concerned, until after the entry by defendant's grantors. At all events, the application for a placer patent was made eleven or twelve years before the alleged right to the lode claims was initiated. Before it can be said that a lode is known to exist, there must be actual knowledge, as distinguished from supposition or surmise. *Sullivan v. Iron Silver M. Co.*, 143 U. S. 431. And in order to uphold the judgment we shall assume, as very properly we may, that the trial court, as a matter of fact, found that the lodes were not known to exist until after the application for a patent was made. Indeed, we do not see what other finding could possibly be made when it is considered that the locators of the lode claims did not enter upon
165 the placer claim to prospect until years after its owners had applied for a patent. And for aught that appears to the contrary—which is the contention of defendants in error in argument—the lodes may have been discovered and their existence thus first become known only by sinking a shaft to a depth of several hundred feet beneath the surface, and that the entry by the lode locators was forcible and against the will of the placer claimant.

(c.) Counsel insists that we have misconstrued the decisions in the cases of the Aurora Lode and the Mt. Rosa Company, upon which we commented in the former opinion. We have given attentive consideration to their argument in that behalf and after carefully re-reading the opinions are satisfied that we have not misconceived their effect. In the syllabus of the Aurora case it is said that the location of a mining claim "does not operate to give title or right of possession to veins or lodes within its limits, or preclude the right of discovery and location thereof by others." This language seems to be taken substantially from what is said in the opinion of the Secretary of the Interior at page 101 of the official report. The statement, removed from its proper setting, may be broad enough to include unknown, as well as known, veins or lodes; but considered, as it should be, in connection with the context, it is clear that the Secretary intended it to apply only to known lodes, for he expressly says, in speaking of the general rule, if the veins or lodes were "not known to exist at that date (*i. e.*, when patent for placer claim is applied for), the placer patent will carry the title to them."
166 This can mean nothing else than that, if lodes or veins are not known to exist within the limits of a placer location at the time when patent for the latter is applied for, they belong to the placer claimant, and one may not thereafter make an entry upon the placer claim for the purpose of discovering and locating them. But if the decision of the Secretary of the Interior in this case can, by any canons of construction, be considered authority for the contention of the plaintiff in error here that a prospector may, without restriction, within the limits of a prior valid placer claim prospect for, and thereafter lawfully locate, lodes not known to exist at the time of the application for a placer patent, its binding effect would seem to be overcome by the decision of the Supreme Court of the

United States in *Bennett v. Harkrader*, 158 U. S. 441, and in many other decisions of that and other courts.

The learned counsel for plaintiff in error were permitted, *amici curiæ*, to file a brief in the Mt. Rosa case, and we then had the benefit of their learning and research, and the record in the case at bar was before us when that opinion was prepared by Mr. Justice Goddard. It was with full knowled[illegible] of the issues herein and as particularly applicable to the arg[illegible]nt of this plaintiff in error made in that case, which is the same as it is here, that the following language found on page 61 was used:

"While we recognize to its full extent the rule that precludes the initiation of a right through a trespass upon the lawful possession of another, we think, under the established facts in this case, appellant is not in a position to invoke its protection. The lodes in question were known to exist prior to the application for patent; and appellant, not having taken the necessary steps to obtain them, they were open to location by others at the time they were located
167 by the grantors of appellee. In making the locations, no right of appellant was invaded, and their validity, therefore, is in no way affected by the fact that they were made within the surface boundaries of a prior placer location."

We then had in mind, as we do now, the distinction between the facts of that case and the case at bar. There it was unquestioned that the lode claims were known to exist within the limits of the placer location before an application for patent for the latter was made. In the case at bar, as we have seen, the findings of fact of the trial court, which upon this review are conclusive upon us, are that the lode claims were not known to exist until long after the application for the placer patent was filed. The distinction is vital and the rule in the two cases is different.

In *Del Monte M. & M. Co. v. Last Chance M. & M. Co.*, 171 U. S., 55, the court, in making answer to questions certified to it by the United States circuit court of appeals of the eighth circuit, said that "the lines of a junior lode location may be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location under-ground or extra-lateral rights not in conflict with any rights of the senior location." And this answer, plaintiff in error now contends, is authority for its contention to which we have just referred. With this we cannot agree. Mr. Justice Brewer, who wrote the opinion in that case, expressly recognizes the fact that no rights can be initiated as the result of a trespass, and on page 79 of the opinion says that the form in which the question is put excludes any impairment or disturbance of the substantial rights of the prior locator; and he quotes with
168 approval the statement from 1 Lindley on Mines, section 363, that "A subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent." While the learned judge was speaking of lode claims, the principle is just as applicable to a placer claim to

the extent of the surface rights which belong to it. So long, therefore, as lode claims are not known to exist within the limits of the prior placer claim at or before the time of the application for placer patent, it is unlawful for one to go within its limits for the purpose of prospecting for, and with the hope of discovering and locating, them.

The application to file a supplemental record and the petition for a rehearing are each denied.

Mr. Justice Steele dissents.

169 I, Horace G. Clark, clerk of the supreme court of the State of Colorado, do hereby certify, that the foregoing is a true copy of an original opinion of the supreme court of the State of Colorado, filed in the above entitled cause on the 3d day of March, A. D. 1902, and of the order of the court denying said motion to file supplemental transcript and also said motion for rehearing, now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office in the city of Denver, this 26th day of March, A. D. 1902.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk Supreme Court,
By —— ——, *Deputy.*

170 *Certificate to Transcript of Record.*

UNITED STATES OF AMERICA, }
District of Colorado, State of Colorado, } *ss:*

I, Horace G. Clark, clerk of the supreme court of the State of Colorado, in the United States of America, do hereby certify, that the foregoing pages, numbered in folios from 1 to 450, inclusive, contain a true and complete transcript of the record and proceedings had in said cause, in the case of The Clipper Mining Company, plaintiff in error, *vs.* The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, A. F. Britton and H. J. Gray, defendants in error, No. 4115, as the same remain of record on file in my office.

In witness whereof, I have caused the seal of the said court to be hereunto affixed, at the city of Denver, in the district and State of Colorado, this 26th day of March, in the year of our Lord 1902, and of the Independence of the United States the one hundred and twenty-sixth.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado,
By JOHN B. COOKE, *Deputy.*

Endorsed on cover: File No. 18,590. Colorado supreme court. Term No. 76. The Clipper Mining Company, plaintiff in error, *vs.* The Eli Mining and Land Company, A. D. Searl, F. C. Schroeder, A. F. Britton, and H. J. Gray. Filed June 21st, 1902.